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No. (1) 071524

Supreme Court, U.S.
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In The

Supreme Court of the United States

CARLOTA COPPER COMPANY,

Petitioner,

v.

FRIENDS OF PINTO CREEK, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Ninth Circuit erred in holding – contrary to this Court's decision in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), a recent Minnesota Supreme Court decision, and the Environmental Protection Agency's interpretation and practice – that the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and an implementing regulation, 40 C.F.R. § 122.4(i), prohibit the Environmental Protection Agency and the states from issuing permits for discharges from "new" sources into "impaired" waters, even though conditions are imposed that reduce net pollution of such waters and improve overall water quality.

PARTIES TO THE PROCEEDINGS

Carlota Copper Company is the petitioner in this Court and was an intervenor in the court of appeals.

The United States Environmental Protection was the respondent in the court of appeals.

The following parties are respondents in this Court and were petitioners in the court of appeals: Friends of Pinto Creek, Grand Canyon Chapter of the Sierra Club, Maricopa Audubon Society, and Citizens for the Preservation of Powers Gulch and Pinto Creek.

CORPORATE DISCLOSURE STATEMENT

Petitioner Carlota Copper Company's parent companies are Carlota Holdings Company (formerly known as Cambior USA, Inc.), a Delaware corporation; Robinson Holdings (USA) Ltd., a Nevada corporation; Robinson Holdings (Canada) Ltd., a British Columbia, Canada, corporation; and Quadra Mining, Ltd., a British Columbia, Canada, corporation. Quadra Mining, Ltd., is a publicly traded company listed on the Toronto Stock Exchange. Carlota Copper Company, Carlota Holdings Company, Robinson Holdings (USA) Ltd., and Robinson Holdings (Canada) Ltd., do not issue any shares of stock to the public.

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OPINIONS BELOW

The Ninth Circuit's opinion (App. 1) is reported at 504 F.3d 1007. The opinion of the U.S. Environmental Protection Agency Environmental Appeals Board (App. 25) is reported at 11 E.A.D. 692 (EAB 2004).

JURISDICTION

The Ninth Circuit issued its judgment on October 4, 2007. App. 1. The Ninth Circuit denied Carlota Copper Company's timely petition for rehearing *en banc* on March 7, 2008. App. 221. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

The relevant provisions of sections 301, 306 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311, 1316, 1342, and 40 C.F.R. § 122.4(i), are set forth in the Appendix. App. 222-226.

STATEMENT OF THE CASE

1. Statutory and Regulatory Background

The Clean Water Act ("Act"), 33 U.S.C. § 1251 *et seq.*, prohibits the discharge of pollutants except as

authorized by specific provisions of the Act. 33 U.S.C. §§ 1311(a). One such provision, section 402, establishes the National Pollutant Discharge Elimination System (NPDES); the NPDES authorizes the Environmental Protection Agency (EPA) to issue permits for discharges of effluent from point sources, such as pipes and conduits, into water.[1] 33 U.S.C. §§ 1342(a), 1362(14); App. 223. The permits must establish effluent limits for the discharges based on technologically-based standards. *Id.* at § 1311(b)(1)(A).

The EPA is required to delegate its NPDES permit authority to a state, if the state submits a program that meets statutory criteria. 33 U.S.C. § 1342(b); *National Ass'n of Home Builders v. Defenders of Wildlife,* 127 S.Ct. 2518, 2525 (2007). These statutory criteria establish requirements similar to those applicable to the EPA-administered program. 33 U.S.C. § 1342(b)(1)(A); 40 C.F.R. § 123.25. The EPA program must, in turn, meet the "same terms, conditions, and requirements" applicable to the state programs. 33 U.S.C. § 1342(a)(3). Thus, the same statutory requirements apply to both the EPA and state programs. To date, forty-five states have been delegated authority to administer their NPDES permit programs. U.S. Environmental Protection Agency, National Pollutant Discharge Elimination

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[1] More precisely, the NPDES applies to discharges into "navigable waters," 33 U.S.C. § 1362(12), which is defined as "waters of the United States," *id.* at § 1362(7). *See South Florida Water Management Dist. v. Miccosukee Tribe*, 541 U.S. 95 (2004).

System, http://cfpub.epa.gov/npdes/statestats.cfm (last accessed Mar. 27, 2008).[2]

Although the NPDES focuses on the discharge of pollutants from point sources, the Act also establishes controls for the quality of the receiving waters. Section 303 requires the states to adopt "water quality standards" for bodies of water, such as rivers and lakes. 33 U.S.C. § 1313(a). If a water body fails to meet the water quality standards, the state must adopt a "Total Maximum Daily Load" (TMDL) for the water body. *Id.* at § 1313(d). A TMDL establishes the maximum "load" of pollutants that a water body can receive from all sources, including both point sources and non-point sources, without violating state water quality standards. 40 C.F.R. §§ 130.2(g)-(i), 130.7(c)(1). Under section 301(b)(1)(C), an NPDES permit must require that the permitted discharges comply with applicable state water quality standards. 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122(d).

Another provision, section 306, requires the EPA to adopt "national standards of performance" for "new sources," that is, sources constructed after adoption of the national performance standards. 33 U.S.C. § 1316(a)(1), -(a)(2); App. 223. The national performance standards must reflect "the greatest degree of effluent reduction" that can be achieved through the

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[2] The only states that have not been delegated such authority are Alaska, Idaho, Massachusetts, New Hampshire and New Mexico. *Id.*

best available technology. 33 U.S.C. § 1316(a)(1). The EPA has promulgated national standards of performance for several categories of point sources, including copper-producing mines, which include Carlota Copper Company's mining project. 40 C.F.R. §§ 440.100 *et seq.*, 440.100(a)(1).

Pursuant to section 306, the EPA has adopted a regulation authorizing the issuance of NPDES permits for discharges by a "new source" or "new discharger" into waters that do not meet state water quality standards. 40 C.F.R. § 122.4(i); App. 224.[3] The first sentence of the regulation prohibits the issuance of a permit if the discharge will "cause or contribute to the violation of water quality standards." *Id.* The second sentence provides that – if a TMDL has been

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[3] 40 C.F.R. section 122.4(i) provides in relevant part:

> No permit may be issued . . . [¶] [t]o a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards . . . and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment, that:
>
> (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and
>
> (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.

adopted that establishes load allocations for the waters – the discharger must demonstrate that (1) there are "sufficient remaining pollutant load allocations" for its discharge, and (2) "existing dischargers" are subject to "compliance schedules" designed to achieve compliance with water quality standards. *Id.*

2. Factual Background

In 1996, Carlota Copper Company ("Carlota") applied to the EPA for an NPDES permit authorizing discharges from a copper mine that Carlota planned to build and operate in Arizona. The discharges will consist of storm water runoff, containing detectable amounts of copper, during extreme storms. The discharges will reach Pinto Creek, which does not meet Arizona's water quality standards for copper. The EPA has adopted a TMDL establishing copper load allocations for Pinto Creek, including specific load allocations for Carlota's storm water runoff. App. 44, 172.

In 2000, four years after Carlota's application, the EPA issued an NPDES permit to Carlota authorizing the storm water discharges into Pinto Creek.[4] The permit contained an offset condition designed to

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[4] Although Arizona, where Carlota's mine is located, received approval to administer its NPDES program as a result of this Court's decision in *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518 (2007), the EPA issued the permit before Arizona received such approval, and has continued to exercise jurisdiction over the permit since then.

improve the creek's water quality and ensure compliance with Arizona's water quality standards. App. 42. The condition requires Carlota to offset the storm water discharges by remediating – that is, removing – copper pollution at an abandoned upstream mine, the Gibson Mine, located on the same creek. App. 42.[5] The EPA's Environmental Appeals Board determined that the copper loadings that will be remediated at the abandoned mine "far exceed Carlota's projected copper loadings" from the storm water runoff, and thus the offset condition will result in a "significant improvement" of the creek's water quality. App. 122, 124.[6]

The permit also requires that Carlota's discharges comply with Arizona's water quality standards. App. 42 n. 19. The State of Arizona has certified, pursuant to section 401(a) of the Act, 33 U.S.C. § 1341(a), that, in light of the offset condition,

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[5] Carlota has largely completed construction of its mine pursuant to the EPA permit, and has already remediated pollution at the Gibson Mine. Carlota does not have any ownership or operational interest in the Gibson Mine.

[6] The permit authorizes Carlota to discharge from Outfall no. 005 – the outfall involved in this case – only the amount of storm water runoff that exceeds a 100-year, 24-hour storm event, *i.e.*, 6.2 inches of rainfall. App. 119. The EPA determined that the amount of copper pollutants *added* to Pinto Creek from Carlota's storm water discharges would be 2.01 kilograms per day (kg/day), compared with the *reduction* of copper pollutants resulting from remediation of the abandoned Gibson Mine of 83,138 kg/day, App. 122 – a reduction of more than 40,000 times the pollution caused by Carlota's storm water discharges.

Carlota's discharges will meet Arizona's water quality standards. App. 42, 44 n. 21.

The EPA concluded that Carlota's discharges will not "cause or contribute" to a violation of water quality standards and are not prohibited by the Act or the regulation, because the offset condition will reduce net pollution in Pinto Creek and Arizona has certified that the discharges will meet its water quality standards. App. 170. Based on these findings, the EPA issued the permit. *Id.*

3. Procedural Background

Friends of Pinto Creek, *et al.* ("Friends"), filed a petition for review with the EPA's Environmental Appeals Board, challenging the EPA's issuance of the permit. The Appeals Board, in a 136-page opinion, concluded that the permit had been properly issued under the Act and the regulation, and denied review. *In re Carlota Copper Company*, 11 E.A.D. 692 (EAB 2004); App. 25.[7]

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[7] The EPA's Regional Office IX had concluded that the second sentence of the regulation – which establishes load allocations and compliance schedules requirements – does not apply to discharges, such as Carlota's, that do not "cause or contribute" to water quality violations and are not prohibited by the first sentence of the regulation. App. 163 n. 101. The EPA Appeals Board "assume[d], without deciding," that both sentences apply, *id.*, and concluded that Carlota's discharges comply with both sentences. App. 163 n. 101, 164-176.

Friends filed a petition for review in the Ninth Circuit pursuant to section 509(b)(1)(F) of the Act, 33 U.S.C. § 1369(b)(1)(F), again challenging the EPA's issuance of the permit. The EPA was the respondent and Carlota was granted intervention.

The Ninth Circuit held that the permit violates the Act and the regulation, 40 C.F.R. § 122.4(i). *Friends of Pinto Creek, et al. v. Environmental Protection Agency, et al.*, 504 F.3d 1007 (9th Cir. 2007); App. 1. The court held that the Act and regulation prohibit new source discharges into "impaired waters" – *i.e.*, waters that do not meet state water quality standards – and that "there is nothing in the Clean Water Act or the regulation that provides an exception for an offset when the waters remain impaired and the new source is discharging pollution into that impaired water." App. 10-11. The court concluded, without any citation to authority, that Carlota's discharges "cause or contribute" to water quality violations, as prohibited by the regulation. *Id.* The court also held that Carlota's discharges do not comply with the second sentence of the regulation, which authorizes new source discharges if (1) there are "sufficient remaining pollutant load allocations" and (2) "existing dischargers" are subject to "compliance schedules." App. 11-12. The court vacated and remanded the permit to the EPA. App. 24.

REASONS FOR GRANTING THE WRIT

This petition raises the question whether the Clean Water Act ("Act") and an implementing EPA regulation, 40 C.F.R. § 122.4(i), prohibit the EPA and the states from issuing permits for discharges from "new" sources into "impaired" waters – that is, waters that do not meet state water quality standards – if conditions are imposed that reduce net pollution of such waters and improve overall water quality. The Act authorizes the EPA to issue NPDES permits for point source discharges into water, including new sources of discharge, and requires that the discharges comply with state-established water quality standards. The Act also requires the EPA to delegate its NPDES permit authority to a state, if the proposed state program meets the statutory criteria. The question presented is whether the EPA – and states that have NPDES-delegated authority – may properly issue NPDES permits for new source discharges into impaired waters subject to conditions that reduce net pollution and improve water quality.

This issue is one of national importance. According to the EPA, 45% of the nation's rivers and streams, and 47% of its lakes, ponds and reservoirs, are considered "impaired or not clean enough to support their designated uses, such as fishing and swimming." EPA, *National Water Quality Inventory: Report to Congress*, 2002 Reporting Cycle, at ES-2 (October 2007). If the EPA and the states cannot approve new source discharges into impaired waters, they would be unable to approve the construction and

operation of new projects and facilities that discharge into almost one-half of the nation's waters. These projects and facilities consist of the national infrastructure necessary to accommodate much of the nation's population growth and economic development – commercial and residential development projects, public waste treatment facilities, industrial projects, mining projects, agricultural operations, and others.[8] Thus, this issue has broad national significance.

In administering their NPDES permit programs, the EPA and the states do not categorically prohibit new source discharges into impaired waters. Instead, they determine on a case-by-case basis whether to approve such discharges, depending on whether the discharges will adversely affect water quality and whether conditions can be imposed that would improve water quality. This approach allows the EPA and the states to exercise discretion and flexibility in administering their NPDES programs, by approving discharges into impaired waters in individualized

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[8] According to the EPA, NPDES permits are typically required for discharges from certain municipal facilities (such as publicly owned treatment works and wastewater systems, and municipal storm sewer systems), industrial and commercial facilities, some agricultural operations (such as animal feeding operations), and construction activities and other land-disturbing activities that involve one acre or more, among others. U.S. Environmental Protection Agency, National Pollutant Discharge Elimination System, http://cfpub.epa.gov/npdes (last accessed April 11, 2008).

cases subject to conditions that reduce net pollution and improve overall water quality. The most common example of such a condition is an "offset." An offset condition requires the discharger to offset its pollution by remediating more pollution from other sources than is caused by discharges from its own source – in effect, to remove more pollutants from the impaired waters than it adds. By requiring remediation of other sources of pollution, an offset condition reduces net pollution and improves overall water quality, and facilitates compliance with water quality standards. Such environmental "tradeoffs" allow the EPA and the states to approve new projects and facilities that discharge into impaired waters while still achieving the Act's goal, which is to "restore and maintain" water quality. 33 U.S.C. § 1251(a). Such tradeoffs provide a practical solution to the competing demands of developing new infrastructure projects and protecting water quality by allowing fulfillment of both within the statutory framework.

In this case, the EPA issued an NPDES permit authorizing Carlota to discharge storm water runoff during extreme, 100-year storms into an impaired creek, and imposed an offset condition requiring Carlota to remediate pollution at an abandoned upstream mine that discharges mining waste into the creek. The EPA determined that the permit and condition will greatly improve the creek's water quality, because the upstream pollution that Carlota is required to remediate greatly exceeds in amount (and occurs more frequently than) the pollution

caused by Carlota's nominal storm water runoff. The permit also requires that Carlota's storm water discharges comply with Arizona's water quality standards. Arizona has certified that the discharges will comply with its water quality standards by improving the creek's water quality.

The Ninth Circuit invalidated the permit on grounds that the Act and the EPA regulation prohibit new source discharges into impaired waters and make no exception for offset conditions that improve water quality. The decision precludes the EPA and the states from determining, on a case-by-case basis, whether specific discharges will adversely affect water quality, and if so, whether conditions can and should be imposed that reduce net pollution and improve water quality. The decision thus precludes the EPA and the states from approving infrastructure projects designed to improve water quality, if the projects discharge into impaired waters. For example, the decision would prohibit a municipal sewage agency from being allowed to replace an old, out-of-date sewage treatment facility with a modern, state-of-the-art facility that produces cleaner effluent. Under the Ninth Circuit decision, the EPA and the states have no discretion to approve discharges into impaired waters, regardless of the water quality effects of the discharges and regardless of whether conditions can be imposed to avoid these effects. No other court has held or suggested that the Act and the regulation impose such stringent restrictions on the

permitting agencies' discretion in administering their NPDES programs.

The Ninth Circuit decision conflicts with this Court's decision in *Arkansas v. Oklahoma,* 503 U.S. 91 (1992). There, this Court held that the EPA and the states have "broad authority" under the Act's NPDES provisions to develop "long-range, areawide programs" to prevent water pollution, and that they may approve new source discharges into impaired waters if this would "improve existing conditions." *Arkansas*, 503 U.S. at 108. Although the Court did not specifically consider the validity of offset conditions, its decision strongly implies that such conditions are valid, because offset conditions "improve existing conditions" by reducing net pollution. While *Arkansas* held that the permitting agencies have "broad authority" under the Act, the Ninth Circuit held that their discretion is very narrow.

The Ninth Circuit failed to apply the proper standard of review in interpreting the EPA's regulation, by not deferring to, and instead rejecting, the EPA's interpretation. The EPA has interpreted its regulation as authorizing the EPA and the states, in their discretion, to approve new source discharges into impaired waters subject to offset conditions that reduce net pollution and improve water quality, and the EPA's administrative practice has conformed to that interpretation. This Court has held that the courts should defer to an agency's interpretation of its regulation, unless the "plain language" dictates otherwise – and no such contrary "plain language"

appears in the agency regulation here. The Ninth Circuit's failure to apply the appropriate standard of review in interpreting the EPA regulation provides an additional ground for review of its decision.

Most significantly, the Ninth Circuit decision conflicts with recent state court decisions, particularly a Minnesota Supreme Court decision. The Minnesota Supreme Court recently held that the Act and the regulation authorize Minnesota's NPDES-permitting agency to approve new source discharges into impaired waters, subject to offset conditions that prevent impairment of water quality. *In re Cities of Annandale, et al.*, 731 N.W.2d 502 (Minn. 2007). The Minnesota Supreme Court substantially relied on this Court's decision in *Arkansas*, which as noted above held that the EPA and the states may flexibly approve new source discharges into impaired waters if they "improve existing conditions." *Arkansas*, 503 U.S. at 108. Similarly, the Virginia Court of Appeals recently held that Virginia's NPDES-permitting agency can properly approve new source discharges into impaired waters subject to limitations that improve water quality. *Crutchfield v. State Water Control Board*, 45 Va.App. 546, 612 S.E.2d 249 (2005). The Minnesota and Virginia decisions allow the permitting agencies to flexibly decide on a case-by-case basis whether to approve new source discharges into impaired waters, depending on their water quality effects. The Ninth Circuit decision, by contrast, precludes the agencies from approving such discharges regardless of their water quality effects.

Since the Ninth Circuit decision conflicts with the decision of the Minnesota Supreme Court, which is Minnesota's "state court of last resort," this case is appropriate for a grant of certiorari on that ground alone under Supreme Court Rule 10(a).

As a result of the conflict between the Minnesota and Virginia decisions and the Ninth Circuit decision, the rules applicable to the states' NPDES permit programs in Minnesota and Virginia – and in other states that follow the court decisions of those two states – are different from the rules applicable to the EPA's NPDES permit program under the Ninth Circuit decision. Under the Act, however, the EPA and the state programs are governed by the same requirements and cannot properly be subject to different rules. To date, forty-five states have been authorized to administer their own NPDES programs. Thus, the Ninth Circuit decision has a potentially far-reaching effect on state water quality programs throughout the nation.

The conflict created by the Ninth Circuit decision will continue to exist regardless of whether the EPA seeks review of the decision. If, for example, the EPA decides no longer to apply offset conditions because of the Ninth Circuit decision, the states' authority to apply such conditions under the Minnesota and Virginia decisions would remain unaffected. This Court can resolve the conflict concerning the national rules governing the NPDES program, and should do so.

I. THE NINTH CIRCUIT DECISION CONFLICTS WITH A RECENT MINNESOTA SUPREME COURT DECISION.

Under Rule 10(a) of the Supreme Court Rules, one of the grounds for granting a writ of certiorari is where "a United States court of appeals . . . has decided an important federal question of law in a way that conflicts with a decision by a state court of last resort. . . ." The Ninth Circuit decision directly conflicts with the Minnesota Supreme Court's recent decision in *In re Cities of Annandale, et al.*, 731 N.W.2d 502 (Minn. 2007). Under Rule 10(a), this case is appropriate for the grant of a writ of certiorari on that ground.

In *Annandale,* the Minnesota Supreme Court held that the Act and the EPA regulation, 40 C.F.R. § 122.4(i), authorized the Minnesota Pollution Control Agency (MPCA), which administers the NPDES program in Minnesota, to issue permits for new source discharges into impaired waters, subject to offset conditions that prevent impairment of water quality. There, the permit authorized a municipal waste treatment agency to discharge a pollutant (phosphorus) from a new waste treatment facility into impaired waters, and contained an offset condition requiring the agency to remove substantially more phosphorus from an old, out-of-date treatment facility than was added by the new facility. The Court held that – because of the offset condition – the discharges did not "cause or contribute" to water quality violations in the watershed, and therefore

were not prohibited by the EPA regulation. 731 N.W.2d at 516-522. This conclusion, the Court stated, was supported by the U. S. Supreme Court's decision in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), which will be discussed in the next part of this petition, and which had held that "nothing in the Act" "prohibit[s] any discharge of effluent that would reach waters in violation of existing water quality standards." 731 N.W.2d at 520, 524; *Arkansas*, 503 U.S. at 107. Citing the *Arkansas* decision, the Minnesota Supreme Court stated that its conclusion is consistent with the Act's goal of granting "flexibility and broad authority" to the EPA and the states to develop "long-range, area-wide programs" for water quality. 731 N.W.2d at 524. The Court stated:

> [W]e conclude that, when dealing with a situation like the one presented in this case – two aging wastewater treatment facilities with expired NPDES permits, which are at or near capacity in a region of the state that is experiencing significant growth – it was not unreasonable for the MPCA to allow a 2,200-pound per year (at capacity) increase in phosphorus discharge from a new wastewater treatment facility to be offset by a contemporaneous 53,500-pound per year decrease in a nearby facility that is located in the same watershed.

Id. at 524. Thus, the Minnesota Supreme Court decision held that both the Act – as interpreted by this Court's decision in *Arkansas* – and the regulation authorize the EPA and the states to approve new

source discharges into impaired waters subject to offset conditions that improve water quality.

The Virginia Court of Appeals followed the same approach in *Crutchfield v. State Water Control Board*, 45 Va.App. 546, 612 S.E.2d 249 (2005). There, the court held that the Act and a Virginia regulation identical to the EPA regulation[9] authorized Virginia's State Water Control Board, which administers the NPDES program in that state, to issue a permit allowing the discharge of treated effluent from a new waste treatment plant into impaired waters. The permit contained a limitation – described as a "self-sustaining limit" – that protected water quality and required compliance with Virginia's water quality standards. The limitation required that the concentration of the pollutant (dissolved oxygen) in the discharged effluent must be lower than the concentration of the pollutant in the river – in effect, that the water quality of the discharges must be higher than the water quality of the river. The court held that since the water quality of the discharges must be higher than that of the river, the discharges will actually improve the river's water quality and reduce net pollution. The court concluded that the discharges will comply with water quality requirements and that

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[9] The Virginia regulation, 9 VAC 25-31-50(C)(9), contains identical language to that found in the EPA regulation, 40 C.F.R. § 122.4(i). *See Crutchfield*, 45 Va.App. at 557-558, 612 S.W.2d at 255.

the permit did not violate the Act or the regulation. *Crutchfield*, 45 Va.App. at 557, 612 S.E.2d at 255.

The Minnesota and Virginia decisions allow the agencies administering the NPDES program to flexibly decide, on a case-by-case basis, whether specific discharges into impaired waters will meet water quality standards, and if not, whether conditions can and should be imposed that will ensure that the standards are met. Although the permit conditions in the Minnesota and Virginia cases were different – one was an offset condition and the other a "self-sustaining limit" – both conditions reduced net pollution and improved water quality, and both facilitated compliance with state water quality standards. Rather than categorically prohibiting the discharges, the Minnesota and Virginia decisions approved the discharges because, as limited by their conditions, they would improve rather than impair water quality. The Ninth Circuit decision, by contrast, prohibits discharges into impaired waters regardless of their water quality effects, and regardless of whether conditions can be imposed to protect water quality. Although the Minnesota and Virginia decisions required a case-by-case analysis of water quality effects, the Ninth Circuit adopted a blanket approach that disregards such effects.

The Ninth Circuit decision, which greatly circumscribes the discretion of the EPA and the states in administering their NPDES programs, directly conflicts with the Minnesota and Virginia decisions, which broadly interpret their discretion. Because of

the conflict, the rules governing the states' NPDES programs in Minnesota and Virginia are different from those governing the EPA program under the Ninth Circuit decision. Under the Act, however, the same NPDES permit requirements apply to both the EPA's program and the states' programs. 33 U.S.C. §§ 1342(a)(3), -(b)(1)(A); 40 C.F.R. § 123.25. Other states that administer their NPDES programs – forty-five states have been granted such authority to date – are apparently free to follow the Minnesota and Virginia decisions, which allow them flexibility in administering their NPDES programs, or instead to follow the Ninth Circuit decision, which precludes the exercise of flexibility. This Court should review this case to resolve the conflict concerning the national rules governing the Act's NPDES program, which is the "primary means" for achieving the Act's effluent limit goals. *Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1371 (D.C. Cir. 1977).

II. THE NINTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S DECISION IN *ARKANSAS v. OKLAHOMA*.

A. The *Arkansas* Decision

In *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), this Court held that the Act authorizes the EPA and the states, in administering their NPDES programs, to issue permits for new source discharges into impaired waters. There, the EPA issued an NPDES permit for a sewage treatment plant in Arkansas, which authorized discharges of effluent into Arkansas

waters that reached impaired waters in Oklahoma. The permit contained limitations and conditions requiring that the discharges comply with Oklahoma's water quality standards. The EPA approved the permit because it would not cause detectable violations of Oklahoma's water quality standards. The Tenth Circuit reversed the EPA's approval of the permit, holding that the Act "requires that 'where a proposed source would discharge effluents that would contribute to conditions currently constituting a violation of applicable water quality standards, such [a] proposed source may not be permitted.'" 503 U.S. at 98. This Court reversed the Tenth Circuit, stating:

> The Court of Appeals construed the Clean Water Act to prohibit any discharge of effluent that would reach waters already in violation of existing water quality standards. We find nothing in the Act to support this reading. . . . [¶] [R]ather than establishing the categorical ban announced by the Court of Appeals – which might frustrate the construction of new plants that would improve existing conditions – the Clean Water Act vests in the EPA and the States broad authority to develop long-range, areawide programs to alleviate and eliminate existing pollution.

503 U.S. at 107, 108.

The Court's above-quoted statement – that the EPA and the states have "broad authority" to develop

"long-range, areawide programs to alleviate and eliminate existing pollution" and to allow construction of "new plants" that would "improve existing conditions" – strongly suggests that the EPA and the states have broad authority to approve discharges into impaired waters subject to offset conditions, because offset conditions "improve existing conditions" by reducing net pollution. Although the Court did not specifically consider the validity of offset conditions, the Court's analysis strongly suggests that such conditions are valid. The *Arkansas* decision, unlike the Ninth Circuit decision here, held that the permitting agencies have broad rather than narrow discretion in deciding whether to approve new source discharges into impaired waters.

Indeed, the Minnesota Supreme Court in *Annandale* substantially relied on the *Arkansas* decision in upholding the validity of the offset condition in that case. *Annandale*, 731 N.W.2d at 520, 525. The Minnesota Supreme Court stated that the opposite view – that offset conditions are invalid – would "perpetuate the very outcome the Supreme Court sought to avoid with its decision in *Arkansas v. Oklahoma* – namely, the adoption of such a rigid approach that construction of new facilities that would improve existing conditions would be thwarted." *Id.* at 525.

B. The Ninth Circuit's Distinction of *Arkansas*

The Ninth Circuit distinguished *Arkansas* on the ground that *Arkansas* simply rejected a "categorical ban" on discharges into impaired waters, and the EPA regulation does not impose a categorical ban but instead allows such discharges under limited circumstances. App. 14-17. As noted earlier, the second sentence of the EPA regulation authorizes discharges into impaired waters if a TMDL establishing load allocations has been adopted for the waters, and if (1) there are "sufficient remaining pollutant load allocations" for the proposed discharge and (2) "compliance schedules" have been adopted for "existing dischargers" to achieve compliance with water quality standards. *Id.*; 40 C.F.R. § 122.4(i)(1), -(i)(2). The Ninth Circuit held that since the regulation authorizes discharges into impaired waters under limited conditions, *Arkansas* does not apply. App. 17.[10]

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[10] Carlota argued in the case below that the second sentence of the EPA regulation does not apply to discharges, such as those involved here, that are not prohibited by the first sentence, which prohibits discharges that "cause or contribute" to water quality violations. Since the purpose of the second sentence is to allow discharges into impaired waters even though they "cause or contribute" to water quality violations and are thus otherwise prohibited by the first sentence, it would be illogical to apply the second sentence to discharges that do not fall within the prohibitory scope of the first sentence. In the case below, the Ninth Circuit "assume[d], without deciding," that both sentences apply to all discharges into impaired waters, because the EPA's Appeals Board had also "assume[d], without deciding," that both

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The Ninth Circuit's distinction of *Arkansas* is misplaced for two main reasons. First, *Arkansas* did not hold simply that the Act does not impose a "categorical ban" on discharges into impaired waters, as the Ninth Circuit stated. Rather, *Arkansas* held, more broadly, that the EPA and the states have "broad authority" to develop "long-range, area-wide programs" to accommodate new sources of development in ways that will "improve existing conditions." 503 U.S. at 108. Thus, *Arkansas* held that the EPA and the states have broad discretion and flexibility in administering their permit programs, and in deciding whether and under what conditions to approve new source discharges into impaired waters. The decision does not narrowly hold, as the Ninth Circuit suggested, that their only discretion is in not categorically prohibiting such discharges. Under *Arkansas*, the agencies' discretion in administering their NPDES programs is broad and substantial, not, as the Ninth Circuit held, narrow and cramped.

Second, the Ninth Circuit interpreted the EPA regulation as imposing such rigid limitations on discharges into impaired waters that the practical effect is to virtually – if not categorically – prohibit all

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sentences apply. App. 13, 163 n. 101; *see* note 7, *supra*. The question whether both sentences of the regulation apply to all new source discharges into impaired waters – even where the discharges do not "cause or contribute" to water quality violations and are not prohibited by the first sentence – is encompassed within the questions presented for review.

such discharges, contrary to the *Arkansas* decision. The Ninth Circuit rejected the EPA's position that the regulation does not impose these rigid limitations.

More specifically, the Ninth Circuit held that the regulation prohibits discharges into impaired waters unless the EPA has issued compliance schedules for both *permitted* and *non-permitted* point source dischargers. App. 12. The regulation provides that compliance schedules must be issued for "existing dischargers," 40 C.F.R. § 122.4(i)(2), and the Ninth Circuit construed "existing dischargers" as referring to *all* point source dischargers, whether permitted or not. App. 12. On the contrary, and as the EPA has concluded, "existing dischargers" refers to *permitted* point source dischargers, because a "schedule of compliance" is defined under the regulations as a "schedule of remedial measures included in a '*permit.*'" App. 174-175, & n. 108; 40 C.F.R. § 122.2 (emphasis added). In holding otherwise, the Ninth Circuit misquoted the regulation – stating that it refers to "existing *discharges*" rather than "existing *dischargers*," App. 12 (emphasis added) – and then relied on its misquotation to extend the regulatory reach to non-permitted dischargers.[11]

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[11] The Ninth Circuit stated that the regulation requires that compliance schedules must be adopted for "existing *discharges*," App. 12 (emphasis added), although the regulation requires instead that such schedules must be adopted for "existing *dischargers*." 40 C.F.R. § 122.4(i)(2) (emphasis added). The court then stated that the misquoted word – "discharges" – refers to

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Additionally, the Ninth Circuit held that – if compliance schedules for permitted point source dischargers are insufficient to achieve water quality compliance – compliance schedules must also be adopted for *non-point source* dischargers. App. 16. Under the Act, however, non-point source dischargers are not subject to regulation under the NPDES, and instead are regulated by the states. 33 U.S.C. § 1329; *Sierra Club v. Meiburg*, 296 F.3d 1021, 1026 (11th Cir. 2002); *Natural Resources Defense Council v. Environmental Protection Agency*, 915 F.2d 1314, 1316 (9th Cir. 1991). The Ninth Circuit improperly extended NPDES requirements to non-point source dischargers not subject to NPDES regulation, and imposed on EPA a permitting responsibility beyond its statutory authority.

Finally, the Ninth Circuit held that the regulation prohibits discharges into impaired waters unless the EPA determines not only that the TMDL load allocations are "sufficient" for the proposed discharge, as the regulation expressly requires, 40 C.F.R. § 122.4(i)(1), but also that TMDL load allocations will be "met . . . under existing circumstances," App. 11-12 – in other words, that other dischargers will meet their own load allocations. The latter requirement does not appear in the regulation.[12]

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the "discharge of a pollutant" and therefore the regulation applies to "any" point source discharge, not just "permitted" point source discharges. App. 12.

[12] The EPA's Appeals Board determined that the regulation requires only a showing that there are "sufficient" load allocations

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To summarize, the Ninth Circuit held that the EPA – and by extension, the states – are prohibited from approving new source discharges into impaired waters unless the following requirements are met: (1) *unpermitted* point source dischargers have been identified and contacted, and permits containing compliance schedules have been issued to them – which, as in Carlota's case, may take many years, or even be impossible because the discharge may be from an "orphan" source (such as an abandoned mine) with no solvent entity that can be subjected to permit conditions; (2) if necessary, *non-point source* dischargers who are not subject to NPDES regulation have also been identified and contacted, and compliance schedules have also been issued for them; and (3) the permitting agency has determined not only the sufficiency of TMDL load allocations for the discharger but also that *other* dischargers will *meet* their own TMDL load allocations.

None of the above italicized requirements appears in the regulation. The Ninth Circuit held,

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for the proposed discharge, as the regulation expressly requires, and that this requirement was satisfied because the Pinto Creek TMDL establishes *specific* load allocations for Carlota's proposed discharges. App. 170-174. The Appeals Board concluded that the petitioners were in effect challenging the TMDL and its implementation, and that a TMDL – which is a form of a state water quality standard – and its implementation cannot be challenged in an NPDES permit hearing and can only be challenged in a separate federal court action brought under the Administrative Procedures Act, 5 U.S.C. § 706(2). App. 172, & n. 105; *In re City of Moscow*, 10 E.A.D. 135, 161 (EAB 2001).

nonetheless, that all three requirements must be met before the permit can be issued.

By imposing these additional requirements, the Ninth Circuit has made it difficult if not virtually impossible for the EPA and the states to approve new source discharges into impaired waters under all but exceptional circumstances. The practical effect of the Ninth Circuit decision is to impose a virtual *de facto* moratorium on new source discharges into impaired waters. On the contrary, this Court in *Arkansas* held that the EPA and the states have broad flexibility and discretion in administering their NPDES programs, and in approving new projects that will "improve existing conditions." 503 U.S. at 108. As the District of Columbia Circuit has stated, where the permitting agency's authority under the Act is unclear, "we are instructed to afford the administering agency the flexibility to achieve the general objectives of the Act." *Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1382 (D.C. Cir. 1977). The question whether the EPA and the states have such flexibility, as this Court held in *Arkansas*, or instead whether they lack flexibility, as the Ninth Circuit held, is the primary question presented in this petition.

III. THE NINTH CIRCUIT FAILED TO APPLY THE APPROPRIATE STANDARD OF REVIEW BY NOT DEFERRING TO THE ENVIRONMENTAL PROTECTION AGENCY'S INTERPRETATION OF ITS REGULATION.

The standard of review applicable in interpreting an administrative regulation is that deference should be accorded to an agency's interpretation of its own regulation, unless the "plain language" dictates otherwise. *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994); *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150 (1991); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988); *Lyng v. Payne*, 476 U.S. 926, 939 (1986); *United States v. Larionoff, et al.*, 431 U.S. 864, 872 (1977); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945); *see Christensen v. Harris County*, 529 U.S. 576, 588 (2000). "[T]he agency's interpretation of its own regulation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Thomas Jefferson University*, 512 U.S. at 512, quoting from *Bowles*, 325 U.S. at 414. Such deference is particularly appropriate where the regulation involves technical or scientific matters within the agency's expertise. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 103 (1983). "When the construction of an administrative regulation rather than a statute is in issue,

deference is even more clearly in order." *Udall*, 380 U.S. at 16.[13]

The EPA regulation prohibits the issuance of NPDES permits for new source discharges into impaired waters if the discharges "cause or contribute" to violations of water quality standards. 40 C.F.R. § 122.4(i). The EPA has interpreted this language as not prohibiting new source discharges into impaired waters subject to conditions that improve water quality, and the EPA's administrative practice has conformed to this interpretation. The EPA's Appeals Board adopted that interpretation in this case, App. 164-170, and stated that this interpretation is "consistent with prior Agency interpretation of that section." App. 165. In earlier proceedings, the EPA has taken the position that new source discharges into impaired waters may be approved if (1) the discharges do not contain the pollutant causing the impairment, (2) the effluent limits for the discharge meet water quality standards, or (3) the discharges are subject to offset conditions that prevent water

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[13] Under the principle established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), deference should be accorded to an agency's interpretation of a *statute* that it is responsible for enforcing, if the statute is ambiguous and the agency interpretation reasonable. *Chevron*, 467 U.S. at 842-843; *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2534 (2007); *Auer*, 519 U.S. at 457; *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 703 (1995); *Pauley v. Director, Office of Workers' Compensation Programs*, 501 U.S. 680, 696 (1991).

quality impairment.[14] Describing the third category – involving offset conditions – the EPA stated:

> [I]t is possible for a discharger to be issued a permit where it is demonstrated that other pollutant source reductions (such as non-point source reductions implemented by the discharger) will offset the discharge in a manner consistent with water quality standards. The ultimate result of this type of "offset" or "trade" may be a net decrease in the loadings of the pollutant of concern in the CWA § 303(d) listed water, and, therefore, EPA, by practice has considered a discharge which has been offset in accordance with permit requirements not to "cause or contribute to a violation of water quality standards."

In re Cities of Annandale, et al., 731 N.W.2d 502, 521 (Minn. 2007). According to the EPA, whether a discharge will "cause or contribute" to a violation of water quality standards must be determined on a "case-by-case basis" and not by application of "*per se*"

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[14] This EPA interpretation was set forth in the EPA's Response Memorandum in *Sierra Club, et al. v. Clifford*, at 50-54, Civ. No. 96-0527 (E.D. La. 1999), which was referred to by the EPA's Appeals Board below. App. 165. This Court has deferred to an agency's interpretation of a regulation expressed in litigation – even the instant litigation – if the interpretation was not a "*post hoc* rationalization" advanced to defend a past position and reflects the agency's "fair and considered judgment." *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *see Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988).

or "categorical" standards.[15] Applying the "case-by-case" analysis here, the EPA's Appeals Board determined that "rather than 'causing or contributing' a degradation, Carlota will be improving Pinto Creek's water quality, or at the very least maintaining water quality." App. 170.

The EPA's interpretation of its regulation is consistent with its Water Quality Trading Policy, which states:

> Finding solutions to these complex water quality problems requires innovative approaches that are aligned with core water programs. Water quality trading is an approach that offers greater efficiency in achieving water quality goals on a watershed basis. It allows one source to meet its regulatory obligations by using pollutant reductions created by another source that has lower pollution control costs. Trading capitalizes on economies of scale and the control cost differentials among and between sources. [¶] The United States Environmental Protection Agency (EPA) believes that market-based approaches such as water quality trading provide greater flexibility and have potential to achieve water quality and environmental benefits greater than would otherwise be achieved under more traditional regulatory approaches.

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[15] *See* EPA brief filed in *Sierra Club, et al. v. Clifford*, at 52, note 14, *supra*.

68 Fed. Reg. 1608, 1609 (Jan. 13, 2003); *see In re Cities of Annandale, et al.*, 731 N.W.2d 502, 522 (Minn. 2007). The trading policy establishes several objectives, one of which to encourage water quality trading where trading "[o]ffsets new or increased discharges resulting from growth in order to maintain levels of water quality that support all designated uses." 68 Fed. Reg. at 1609-1610.

The EPA's interpretation of the regulation does not contravene its "plain language" and is entitled to deference. As the EPA's Appeals Board concluded, discharges subject to offset conditions do not "cause or contribute" to water quality violations because they improve rather than impair water quality. App. 164-170. The EPA's interpretation is also consistent with the Minnesota Supreme Court's decision in the *Annandale* case, which held that the EPA regulation does not prohibit discharges into impaired waters subject to offset conditions that improve water quality. *In re Cities of Annandale, et al.*, 731 N.W.2d 502, 521 (Minn. 2007); *see also Crutchfield v. State Water Control Board*, 45 Va.App. 546, 612 S.E.2d 249, 557-558 (2005). The Minnesota Supreme Court stated that the regulation is, at a minimum, "ambiguous," and therefore deference should be accorded to the Minnesota water quality agency's interpretation, which was the same as the EPA interpretation. *Annandale*, 731 N.W.2d at 519.

The Ninth Circuit did not defer to the EPA's interpretation of its regulation, nor even mention this Court's decisions requiring such deference. The Ninth

Circuit instead adopted the opposite interpretation, holding that offset conditions are invalid regardless of their water quality effects. App. 10-11. The Ninth Circuit failed to apply the appropriate standard of review in construing the regulation, which requires deference to the agency's interpretation unless the "plain language" dictates otherwise – and no such contrary "plain language" appears in the EPA regulation here. The Ninth Circuit's failure to apply the appropriate review standard provides an additional ground for review of its decision.

Although this case raises questions concerning the interpretation of both a statute and a regulation, this Court has reviewed cases involving solely the interpretation of a regulation.[16] In one such case, *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994), this Court resolved a conflict between two federal circuit courts in interpreting a regulation. In

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[16] As stated earlier, this Court has held in several cases that deference should be accorded to an agency's interpretation of its regulation unless the "plain language" dictates otherwise. *See, e.g., Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994); *see* page 29, *supra*. Although some of the cited cases involved interpretations of both a statute and a regulation, such as *Auer*, others involved solely the interpretation of a regulation, such as *Thomas Jefferson University*. Other cases involving solely the interpretation of a regulation are *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144 (1991), *Lyng v. Payne*, 476 U.S. 926 (1986), *Udall v. Tallman*, 380 U.S. 1 (1965), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

the same vein, this case involves a conflict between a federal circuit court (Ninth Circuit) and a state's highest court (Minnesota Supreme Court) in interpreting a regulation. Additionally, the case presents issues of national importance; the Ninth Circuit's interpretation restricts the EPA's and the states' discretion in administering their NPDES programs, and conflicts with this Court's decision in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992). Because of the conflicts and the nationally-important issue, this case would be worthy of review even if the sole question concerned the interpretation of the regulation.

IV. THE CLEAN WATER ACT AND THE REGULATION AUTHORIZE – AND DO NOT PROHIBIT – THE ISSUANCE OF PERMITS FOR DISCHARGES INTO IMPAIRED WATERS, SUBJECT TO CONDITIONS THAT REDUCE NET POLLUTION AND IMPROVE WATER QUALITY.

On the merits, the Act and the EPA regulation authorize – and do not prohibit – the issuance of NPDES permits for discharges into impaired waters subject to conditions, such as offset conditions, that reduce net pollution and improve water quality.

A. The Statute

The Act grants "broad authority" to the EPA and the states to develop NPDES programs "to alleviate and eliminate existing pollution" and "improve existing

conditions," as this Court held in *Arkansas v. Oklahoma*, 503 U.S. 91, 102 (1992). This "broad authority" allows the NPDES permitting agencies to flexibly decide, on a case-by-case basis, whether discharges into impaired waters will violate water quality standards, and whether conditions can and should be imposed to prevent such violations. Nothing in the statute precludes the permitting agencies from exercising such broad authority.

The conclusion that the Act grants such broad authority is supported by the statutory language. Section 402(a)(1) authorizes the EPA to issue NPDES permits for point source discharges subject to "such conditions as the Administrator [of the EPA] determines necessary to carry out the provisions of this chapter." 33 U.S.C. § 1342(a)(1); App. 224. Section 301(b)(1)(C) provides that NPDES permits must include effluent limitations necessary to "implement any applicable water quality standard" established by a state under section 303. 33 U.S.C. § 1311(b)(1)(C); App. 222-223. Thus, the statute specifically requires that NPDES permits implement state "water quality standard[s]," and specifically authorizes "conditions" to achieve such standards. Accordingly, the statute by its terms authorizes offset conditions, because offset conditions are intended to achieve compliance with water quality standards. *Cf. Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1375 (D.C. Cir. 1977) (Under section 402, "the [EPA] Administrator has discretion either to issue a permit or to leave

the discharges subject to the total proscription of [section] 301.").

Section 306 of the Act requires the EPA to adopt "national standards of performance" for new sources that "reflect[] the greatest degree of effluent reduction" achievable through available technology. 33 U.S.C. § 1316(a)(1); App. 223. An offset condition necessarily achieves "the greatest degree of effluent reduction," as required by the statute, because it reduces net pollution caused by discharges of effluents.

Section 101(a) declares that the Act's goal is to "restore and maintain" the nation's water quality. 33 U.S.C. § 1251(a). An offset condition that reduces net pollution and improves water quality necessarily furthers the statutory goal of "restor[ing] and maintain[ing]" water quality. By contrast, the Ninth Circuit's all-or-nothing approach to the attainment of water quality standards obstructs the statutory goal. The Ninth Circuit decision imposes a virtual *de facto* moratorium on the issuance of NPDES permits for new source discharges into impaired waters, thus reducing incentives for dischargers to clean up such waters through the NPDES permit process – and limiting the discretion of permitting agencies to offer such incentives. The decision, for example, would make it difficult for permitting agencies to authorize municipal sewage agencies to replace out-of-date sewage facilities with modern ones that produce cleaner effluent, as the municipal agency did in the *Annandale* case decided by the Minnesota Supreme

Court. *In re Cities of Annandale, et al.*, 731 N.W.2d 502, 524 (Minn. 2007). The Ninth Circuit decision impedes the development of infrastructure projects that would further the statutory goal of improving the nation's water quality.

B. The Regulation

The EPA regulation prohibits the issuance of NPDES permits for new source discharges into impaired waters that will "cause or contribute to the violation of water quality standards." 40 C.F.R. § 122.4(i); App. 224. The regulation, on its face, does not prohibit *all* discharges into impaired waters, regardless of their effects on water quality. Instead, the regulation facially prohibits only discharges that will "cause or contribute" to water quality violations. A discharge subject to an offset condition requiring remediation of other sources of pollution does not, by definition, "cause or contribute" to water quality violations; although the permit authorizes the discharge of pollutants, the condition requires the removal of more pollutants than are discharged, and thus improves overall water quality. Rather than "caus[ing] or contribut[ing]" to water quality violations, an offset condition causes a *reduction* of such violations. The EPA regulation prohibits discharges that impair water quality, not improve it. The regulation plainly does not prohibit offset conditions.

The Ninth Circuit's observation that the Act and the regulation make no "exception" for offset conditions, App. 10-11, is beside the point. A discharge subject to an offset condition that reduces net pollution does not "cause or contribute" to water quality violations and thus does not fall within the scope of the regulatory prohibition. A prohibition that does not apply by its own terms does not require an "exception" to render it non-applicable.

In sum, the Act and the regulation grant broad authority to the EPA and the states to adopt measures to protect and improve water quality, and to impose conditions in NPDES permits that further this goal. This grant of authority includes the discretion to impose offset conditions that improve the quality of impaired water bodies. Nothing in the Act or the regulation *prohibits* the EPA and the states from imposing such conditions. The Ninth Circuit decision, by reading requirements into the statute and the regulation that do not appear on their face, greatly restricts the EPA's and the states' discretion in administering their NPDES programs. The decision makes it difficult for the EPA and the states to approve new development projects necessary to accommodate the nation's demographic and economic growth, even though conditions are imposed that achieve the Act's goal of improving water quality. This Court should grant review and reverse.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRIENDS OF PINTO CREEK; GRAND CANYON CHAPTER OF THE SIERRA CLUB, MARICOPA AUDUBON SOCIETY AND CITIZENS FOR THE PRESERVATION OF POWERS GULCH AND PINTO CREEK,

Petitioners,

CARLOTA COPPER COMPANY,

Intervenor,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL APPEALS BOARD; STEPHEN L. JOHNSON, Acting Administrator, United States Environmental Protection Agency,

Respondents.

No. 05-70785

OPINION

On Petition for Review of an Order of the Environmental Protection Agency

Argued and Submitted
November 13, 2006 – San Francisco, California

Filed October 4, 2007

Before: Procter Hug, Jr., A. Wallace Tashima, and Ronald M. Gould, Circuit Judges.

Opinion by Judge Hug

COUNSEL

Roger Flynn, Western Mining Action Project, Lyons, Colorado, for the petitioners.

D. Judith Keith, United States Department of Justice, Environmental Defense Section, Washington, DC; John S. Most, United States Department of Justice, Natural Resources Section, Washington, DC, for the respondents.

Amy R. Porter, Lewis and Roca LLP, Phoenix, Arizona, for the intervenor.

OPINION

HUG, Circuit Judge:

In this case, we determine whether the Environmental Protection Agency ("EPA") properly issued a National Pollution Discharge Elimination System ("NPDES") permit under the Clean Water Act to Carlota Copper Company ("Carlota"). The permit allows mining-related discharges of copper into Arizona's Pinto Creek, a waterbody already in excess of water quality standards for copper. Based upon provisions of the Clean Water Act, the implementing regulations, and their applicability to the factual scenario of this case, we vacate the permit and remand.

I. FACTUAL BACKGROUND

Pinto Creek is a desert river located near Miami, Arizona, approximately 60 miles east of Phoenix. It has been listed by the American Rivers Organization as one of the country's most endangered rivers due to threats from proposed mining operations. Pinto Creek and its riparian environs are home to a variety of fish, birds, and other wildlife, some of which are specially protected. Due to excessive copper contamination from historical mining activities in the region, Pinto Creek is included on Arizona's list of impaired waters under § 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), as a water quality limited stream due to non-attainment of water quality standards for dissolved copper.

Carlota proposed to construct and operate an open-pit copper mine and processing facility approximately six miles west of Miami, Arizona, covering over 3000 acres while extracting about 100 million tons of ore. Part of the operation plan includes constructing diversion channels for Pinto Creek to route the stream around the mine, as well as groundwater cut-off walls to block the flow of groundwater into the mine.

In compliance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq., the U.S. Forest Service prepared an Environmental Impact Statement ("EIS"), after determining the project would potentially have a significant impact on the environment, and later finalized the document as

its Final EIS ("Forest Service FEIS"). The Army Corps of Engineers also prepared an Environmental Assessment ("Corps EA") covering the physical construction of proposed diversion channels redirecting water from Pinto Creek and the Powers Gulch stream around the mine and into Pinto Creek. Because the proposed action would involve the discharge of pollutants into Pinto Creek, Carlota applied to the EPA for an NPDES permit under § 402 of the Clean Water Act, 33 U.S.C. § 1342, in 1996. The EPA ultimately issued the permit, and the Environmental Appeals Board ("Appeals Board"), the internal appellate board of the EPA, denied review.

II. ISSUES

A. Whether the issuance of the permit to discharge a pollutant, dissolved copper, into Pinto Creek, which already exceeded the amount of dissolved copper allowed under the Section 303(d) Water Quality Standard, is in violation of the Clean Water Act and the applicable regulations.

B. Whether the EPA's failure to include and regulate all discharges from the Carlota Copper Mine in the NPDES permit violates the Clean Water Act and the applicable regulations.

C. Whether the EPA complied with the requirements of the National Environmental Policy Act ("NEPA").

III. PROCEDURAL BACKGROUND

The EPA published for public comment a draft NPDES permit for Carlota in 1998. To fulfill its information-gathering requirements under NEPA, 42 U.S.C. §§ 4321-4370f, the EPA adopted the Forest Service FEIS and the Corps EA. In response to comments received on its draft NPDES permit, the EPA amended the draft permit by adding two new conditions – (1) requiring additional groundwater discharges to augment the stream flow into Pinto Creek, and (2) an offset provision whereby Carlota would be required to remediate sources of copper loading from an upstream inactive mine site called the Gibson Mine.

On June 30, 2000, the Arizona Department of Environmental Quality ("Arizona DEQ") certified the final permit with the two new conditions as meeting state water quality standards under § 401 of the Clean Water Act, 33 U.S.C. § 1341, and on July 24, 2000, the EPA issued an NPDES permit to Carlota, as well as a Record of Decision formally adopting the Forest Service FEIS and the Corps EA for the current permit.

On August 24, 2000, the Petitioners filed their first Petition for Review of the NPDES permit and the NEPA documents with the Appeals Board. The Petitioners argued that: (1) because Pinto Creek is an impaired water under the Clean Water Act, the EPA should establish a Total Maximum Daily Load ("TMDL") for copper discharges into Pinto Creek

before issuing Carlota's permit, (2) the EPA did not provide public notice of and a public comment period for the two new permit conditions, (3) Carlota needed an additional NPDES permit for discharges from the Gibson Mine site, and (4) the Forest Service FEIS and Corps EA documents did not consider environmental impacts of the two new permit conditions.

The EPA did not respond and, instead, withdrew portions of the challenged NPDES permit stating that the permit was not severable from the contested conditions and that the permit should be stayed pending final agency action. The EPA then prepared a supplemental environmental assessment ("EPA's supplemental EA") analyzing only the two new conditions. In response to the Petitioners' contention of the necessity to establish a TMDL, the EPA completed a TMDL for dissolved copper in Pinto Creek. The EPA then provided a public comment period, but only for the two new permit conditions and the EPA's supplemental EA. The Arizona Department of Environmental Quality issued a second certification under § 401 of the Clean Water Act in February 2002. In accordance with its new analysis, the EPA issued a Finding of No Significant Impact on February 27, 2002, determining it would not have to prepare a new EIS, and issued the permit.

On April 1, 2002, the Petitioners filed a second Petition for Review with the Appeals Board challenging the EPA's decision to issue the Carlota permit. The principal challenges were that: (1) the permit should have covered the diversion channels that

discharged into Pinto Creek, (2) the EPA must regulate all project discharges, (3) the permitted discharges violated Arizona anti-degradation requirements and water quality standards, and (4) the EPA violated NEPA in several ways.

The Appeals Board entered its order denying review on September 30, 2004. The EPA issued the final NPDES permit to Carlota, and the Petitioners filed for review in this court.

IV. ANALYSIS

A. Objective of the Clean Water Act.

It is important to consider the objectives and purpose of the 1972 revisions of the Clean Water Act, which are presently applicable to the considerations involved here. 33 U.S.C. § 1251 (1987) provides:

> The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter – (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985. . . . (3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited.

Under the 1972 revisions of the Clean Water Act, there is direct federal regulation of the discharge of pollutants from point sources. *Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002). "[P]oint sources of

pollution are those [where the pollutant flows] from a discrete conveyance, such as a pipe or tunnel. Non-point sources of pollution are non-discrete sources" and are the responsibility of the states, with certain federal oversight. *Id.* at 1125-27. An example of a non-discrete source is runoff from a farmland or timber harvesting.

Our *Pronsolino* opinion provides a detailed description of the operation of the Clean Water Act. We here summarize the provisions pertinent to this case.

Under § 303 of the Clean Water Act, 33 U.S.C. § 1313, the states are required to set water quality standards for all waters within their boundaries, regardless of the sources of the pollution entering the waters. Pursuant to § 303(d)(1), 33 U.S.C. § 1313(d)(1), each state is required to identify those waters that do not meet the water quality standard which is frequently called the "§ 303(d)(1) list." For impaired waters identified in the § 303(d)(1) list, the states must establish a TMDL for pollutants identified by the EPA. A TMDL specifies the maximum amount of pollutant that can be discharged or loaded into the waters from all combined sources, so as to comply with the water quality standards.

Each state is required to submit its § 303(d)(1) list and its TMDL to the EPA for its approval or disapproval. If the EPA disapproves either of those documents, the EPA is responsible for preparing that document. The state then incorporates its § 303(d)(1)

list and its TMDL or the EPA's approved document into its continuing planning process as required by § 303(e), 33 U.S.C. § 1313(e).

In this case, the state had prepared the § 303(d)(1) list, but it had not prepared a TMDL. Therefore, in response to the Petitioners' objection, the EPA prepared the TMDL utilized in its awarding of the permit.

B. Carlota's Discharge into an Impaired Waterway.

The Petitioners contend that as a "new discharger" Carlota's discharge of dissolved copper into a waterway that is already impaired by an excess of the copper pollutant violates the intent and purpose of the Clean Water Act. Under the NPDES permitting program, 40 C.F.R. § 122.4(i) addresses the situation where a new source seeks to permit a discharge of pollutants into a stream already exceeding its water quality standards for that pollutant. Section 122.4 states in relevant part:

> No permit may be issued:
>
> . . . .
>
> (i) To a new source or a new discharger if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality

> standards or is not expected to meet those standards . . . and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that:
>
> (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and
>
> (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.

40 C.F.R. § 122.4 (2000).

The plain language of the first sentence of the regulation is very clear that no permit may be issued to a new discharger if the discharge will contribute to the violation of water quality standards. This corresponds to the stated objectives of the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a) (1987). And that "it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited." 33 U.S.C. § 1251(a)(3) (1987).

The EPA contends that the partial remediation of the discharge from the Gibson Mine will offset the pollution. However, there is nothing in the Clean Water Act or the regulation that provides an exception for an offset when the waters remain impaired

and the new source is discharging pollution into that impaired water.[1]

The regulation does provide for an exception where a TMDL has been performed and the owner or operator demonstrates that *before the close of the comment period* two conditions are met, which will assure that the impaired waters will be brought into compliance with the applicable water quality standards. The plain language of this exception to the prohibited discharge by a new source provides that the exception does not apply unless the new source can demonstrate that, under the TMDL, the plan is designed to bring the waters into compliance with applicable water quality standards.

The EPA argues that under the requirements of clause (1), there are sufficient remaining load allocations to allow for the discharge because the TMDL provides a method by which the allocations could be established to allow for the discharge. There is no contention, however, that these load allocations represent the amount of pollution that is currently discharged from the point sources and nonpoint sources, and there is no indication of any plan that will effectuate these load allocations so as to bring Pinto Creek within the water quality standards. The TMDL merely provides for the manner in which Pinto Creek *could* meet the water quality standards if all of

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[1] It is questionable whether there really is an offset. *See* discussion in the next section.

the load allocations in the TMDL were met, not that there are sufficient remaining pollutant load allocations under existing circumstances.

With regard to the requirements of clause (2), the EPA argues that the requirement of "compliance schedules" pertains only to point sources for which there is a permit. This does not correspond to the plain language of clause (2), which provides "the existing discharges into that segment [of Pinto Creek] are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards." 40 C.F.R. § 122.4(i)(2) (2000).

We examine that language utilizing the definitions provided in the regulation. The term "discharge" is defined to mean "the discharge of a pollutant." 40 C.F.R. § 122.2 (2000). The term "discharge of a pollutant," is defined as any addition of any "pollutant" or combination of pollutants to "waters of the United States" from "*any point source.*" *Id.* at § 122.2(a) (emphasis added). Thus, under the plain language of the regulation, compliance schedules are not confined only to "permitted" point source discharges, but are applicable to "any" point source.

The EPA contends that this would amount to a complete ban of the discharge of pollution to impaired waters. This is based on its misreading of the plain language of the regulation to state that the remediation has to be *completed* before Carlota's discharge. The plain language of clause (2) of the regulation, instead, provides that existing discharges into that

segment (of the waters) are "subject to *compliance schedules* designed to bring the segment into compliance with applicable water quality standards." 40 C.F.R. § 122.4(i)(2) (2000) (emphasis added). This is not a complete ban but a requirement of schedules to meet the objective of the Clean Water Act.

Here the existing discharges from point sources are not subject to compliance schedules designed to bring Pinto Creek into compliance with water quality standards. Thus, Carlota has not demonstrated that clause (2) of 40 C.F.R. § 122.4(i) has been met. This is the regulation upon which Carlota and the EPA rely for issuance of the permit.

Initially, Carlota and the EPA contended that the first and second sentences of § 222.4(i) could be construed to apply independently, thus not requiring compliance with clauses (1) and (2) when an offset would result in a substantial net reduction of pollution to the impaired waters. The Petitioners, on the other hand, maintained that the two sentences must be read together, not independently. However, the EPA subsequently asked the Appeals Board to assume, for purposes of this decision, that clauses (1) and (2) do apply. *See In re Carlota Copper Co.*, 11 E.A.D. 692, 766 (EAB 2004). Thus, we are concerned in this case with whether the EPA required Carlota to fulfill all of the requirements of § 122.4(i), including clauses (1) and (2), in order to issue a permit to it as a new discharger.

The Respondents and Carlota rely on *Arkansas v. Oklahoma,* 503 U.S. 91 (1992) in support of their contentions. That case involved the issuance of a permit for a city in Arkansas to discharge effluent into a stream in Arkansas that entered a river that eventually flowed into Oklahoma. Oklahoma challenged the permit before the EPA, alleging that the discharge violated Oklahoma Water Quality Standards. In that case, the EPA found that the discharge would not lead to a "detectable change in water quality," which the Supreme Court held was supported by substantial evidence. *Arkansas,* 503 U.S. at 112. In the opinion, the Court stated that "the parties have pointed to nothing that mandates a complete ban on discharges into a waterway that is in violation of those standards. The statute does, however, contain provisions designed to remedy existing water quality violations and to allocate the burden of reducing undesirable discharges between existing sources and new sources. *See, e.g.* § 1313(d)." *Id.* at 108. Section 1313(d) of the Clean Water Act, referred to by the Court, is the one that provides for the establishment of water quality standards and TMDLs.

The Supreme Court in *Arkansas v. Oklahoma* also referred to § 1288(b)(2), which provides for the development of area-wide programs to eliminate existing pollution in the context of area-wide waste treatment management. *Id.* That section provides details required of any plan to eliminate the pollution, including schedules, time lines, identification of

agencies, and identification of measures necessary to carry out the plan.

The Appeals Board stated that prior Agency pronouncements "confirm our position that, rather than completely banning new source discharges, § 122.4(i) provides new sources with the opportunity to obtain a permit if the requirements specified in that section are met." *In re Carlota Copper Co.*, 11 E.A.D. 692, 765 (EAB 2004). The prior Agency position quoted states:

> A new source or new discharger may, however, obtain a permit for discharge into a water segment which does not meet applicable water quality standards by submitting information demonstrating that there is sufficient loading capacity remaining in waste load allocations (WLAs) for the stream segment to accommodate the new discharge and that existing dischargers to that segment are subject to *compliance schedules* designed to bring the segment into compliance with the applicable water quality standards.

Id. (emphasis added). The language quoted by the Appeals Board from the prior agency action requires compliance schedules designed to bring the water segment into compliance with the applicable water quality standards.

In Carlota's case, there are no plans or compliance schedules to bring the Pinto Creek segment "into compliance with applicable water quality standards," as required by § 122.4(i)(2), which Carlota

and the EPA both acknowledge is the applicable section with which Carlota must comply. The error of both the EPA and Carlota is that the objective of that section is not simply to show a lessening of pollution, but to show how the water quality standard will be met if Carlota is allowed to discharge pollutants into the impaired waters.[2]

The EPA has the responsibility to regulate discharges from point sources and the states have the responsibility to limit pollution coming into the waters from non-point sources. If point sources, other than the permitted point source, are necessary to be scheduled in order to achieve the water quality standard, then the EPA must locate any such point sources and establish compliance schedules to meet the water quality standard before issuing a permit. If there are not adequate point sources to do so, then a permit cannot be issued unless the state or Carlota agrees to establish a schedule to limit pollution from a nonpoint source or sources sufficient to achieve water quality standards.

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[2] The only step the EPA or Carlota has taken to meet the requirements of § 122.4(i)(2) is the partial remediation of the Gibson Mine discharge. The following statement illustrates the Appeals Board's erroneous view of the objective of § 122.4(i)(2):

> The goal of the proposal is not, as Petitioners and other commenters seemed to believe, the restoration of the entirety of Pinto Creek to water quality standards. While desirable, this is not the intent of the proposed action.

In re Carlota Copper Co., 11 E.A.D. 692, 784 (EAB 2004).

The EPA contends that it cannot be judicially compelled to act against point sources that are illegally discharging into Pinto Creek. The EPA notes that while it has the authority to act against violators, its decision to do so in ordering its priorities is a matter that is typically committed to its absolute discretion, citing *Sierra Club v. Whitman,* 268 F.3d 898, 903 (9th Cir. 2001) and *Heckler v. Chaney,* 470 U.S. 821, 831-32 (1985).

In Carlota's case, there is nothing in § 122.4(i) that compels the EPA to act against point sources that are violating the Clean Water Act by their discharges into Pinto Creek or requiring judicial review of the EPA's ordering of priorities in any failure to act. The requirement of § 122.4(i)(2) is simply a condition that must be met before a permit can be issued to a new discharger into impaired waters. There is no compulsion on the EPA to act against point source violators, as in *Sierra Club* or *Heckler.* The EPA remains free to establish its priorities; it just cannot issue a permit to a new discharger until it has complied with § 122.4(i)(2).

In this case, the Petitioners do not argue for an absolute ban on discharges into a waterway that is in violation of the water quality standards. Rather, the Petitioners point to the § 122.4(i) exception by which a new discharger can comply with the Clean Water Act requirements. Those requirements simply were not met. Thus, no conflict exists with the Supreme Court's opinion in *Arkansas v. Oklahoma.*

C. Pollution From the Diversion Channels.

Carlota proposed to construct two diversion channels that would divert surface and groundwater around the mine facilities. The Pinto Creek diversion channel would extend approximately 5250 feet and then into Pinto Creek. The Powers Gulch stream diversion channel would extend approximately 7900 feet into the Powers Gulch stream, which eventually connects to Pinto Creek. Both channels will eventually add pollutants, including copper, into Pinto Creek especially from the groundwater that Carlota will be directing into the channels for discharge into Pinto Creek.

In order to block groundwater from entering the main Carlota Mine pit, Carlota will construct a cutoff wall down to bedrock that will divert the groundwater to the surface and into the Pinto Creek diversion channel. The Forest Service FEIS stated: "The cutoff wall would be an impermeable barrier extending from the surface down through the alluvium and into the bedrock. The cutoff wall would be designed to prevent water from moving toward the pit and would encourage the alluvial flow to surface into the diversion channel to be routed around the pit." *Fed. Envtl. Impact Statement for Carlota Copper Project,* Vol. 1, Ch. 2, p. 16 (1997). The Forest Service FEIS also noted that the alluvial groundwater that will enter the diversion channel contains dozens of pollutants, including copper, that will be added to Pinto Creek. According to the Forest Service FEIS, the amount of

dissolved copper in this groundwater would be significant. In addition to the groundwater directed into Pinto Creek via the Pinto Creek diversion channel, a similar cutoff wall is proposed to direct groundwater into the Powers Gulch stream diversion channel and ultimately into Pinto Creek. Like the groundwater added to the Pinto Creek via the Pinto Creek diversion channel, the groundwater added to the Powers Gulch stream contains elevated levels of copper and other pollutants. The EPA did not consider the copper contributions from the use of the proposed diversion channels and groundwater cutoffs. The Appeals Board refused to consider these additional sources of copper pollution because it was not raised in the first comment period for the permit.

In the Petitioners' first Petition for Review of the NPDES permit and the NEPA documents before the Appeals Board, the Petitioners contended, among other things, that the EPA had not allowed a comment period on the two new conditions added to the permit and that the EPA should establish a TMDL for copper discharges into Pinto Creek before issuing Carlota's permit. The EPA did not respond and, instead, withdrew portions of the challenged NPDES permit stating that the permit was not severable from the contested conditions and that the permit should be stayed until pending final agency action.

After establishing a TMDL for copper in Pinto Creek, Carlota then pursued a renewal of the permit based upon 40 C.F.R. § 122.4(i). Carlota has conceded

that for the purpose of this decision § 122.4(i), including clauses (1) and (2), is applicable. Carlota was thus proceeding on the basis that a TMDL had been issued and that it was required to comply with clauses (1) and (2). Section 122.4(i) requires that a new discharger into impaired waters for which a pollutant's load allocation for the pollutant to be discharged "must demonstrate, before the *close of the comment period,*" the compliance with clauses (1) and (2). 40 C.F.R. § 122.4(i) (2000) (emphasis added). The comment period referred to could not have been the initial comment period before a TMDL was sought or established. The comment period had to relate to the new basis for Carlota's permit under § 122.4(i).

All of the claims that the Petitioners now rely upon were raised during the comment period after the TMDL was performed. They could not have been raised in the first comment period. These claims were made known to the EPA not only in the second comment period but also at the time of the preparation of the TMDL by a letter that raised the point, a copy of which was furnished directly to the EPA. Thus, the claim with regard to the copper discharge from the diversion channels and the cutoff walls was timely raised and should not have been deemed forfeited, but it should have been considered by the Appeals Board. This would be important in determining whether the requirement for compliance schedules set out in § 122.4(i)(2) had been met and also it would be important in determining the extent of the

pollutants contributed by Carlota that would be offset by the Gibson Mine remediation.

D. The State of Arizona's Requirements.

In addition to violating 40 C.F.R. § 122.4(i), the Petitioners contend that the permit also violates the provisions of 40 C.F.R. § 122.4(d), which provides that no permit may be issued "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States." 40 C.F.R. § 122.4(d) (2000). This must be considered in connection with § 122.4(a), which states that no permit may be issued "when the conditions of the permit do not provide for compliance with the applicable requirements of the Clean Water Act or regulations promulgated under the Clean Water Act." *Id.* at § 122.4(a). Thus, the requirements of § 122.4(d) are in addition to complying with all of the requirements of the Clean Water Act and the regulations promulgated under the Clean Water Act.

Since we here hold that the permit does not comply with § 122.4(i), the additional requirement of § 122.4(d) need not be considered at this time. It would be appropriate to consider the requirements of § 122.4(d) if a permit is properly issued under § 122.4(i).

E. Compliance With the Requirements of NEPA.

NEPA requires agencies to examine potential environmental effects of any proposed action, and to inform the public of its studies and resulting concerns. If any agency determines that its action may have a significant impact on the environment, the agency is required to prepare an EIS describing the impacts of the action and possible alternatives. 42 U.S.C. § 4332(2)(C) (1975). To determine if the action will require an EIS, the agency may first prepare an environmental assessment ("EA"). 40 C.F.R. § 1508.9 (1998). If the EA indicates that there will not be a significant impact on the environment, the agency may issue a Finding of No Significant Impact, in which case an EIS is not required. 40 C.F.R. § 1508.13 (1998).

In the first appellate review before the Appeals Board, the Petitioners challenged the EPA's failure to allow comments on the two new permit conditions and also the failure to conduct a TMDL prior to issuing the permit. The supplemental EA issued by the EPA addressed only the environmental effect of the two new conditions, not the effect of a permit issued to a new discharger under § 122.4(i), including clauses (1) and (2). There is nothing wrong with incorporating and relying upon the Forest Service FEIS because it had discussed the effect on waters by the proposed Carlota Mine. However, the EA produced by the EPA should have discussed the revised

permit issued under § 122.4(i), including clauses (1) and (2).

The Petitioners argued that the EPA failed to take a "hard look" at its failure to consider the discharges from the two diversion channels, including the walls to be established to prevent groundwater from reaching the mine facilities, which would contribute alluvial water, including copper pollution, to Pinto Creek. The Appeals Board refused to consider this argument because it contended that it had not been raised during the first comment period. As we have previously explained, it was not possible to comment upon the request for a permit based upon the TMDL and the requirements of § 122.4(i) until after the TMDL had been issued. Thus, for the reasons we expressed in the prior section, it was error for the Appeals Board not to consider additional discharges from the diversion channels.

The Petitioners also raised other questions concerning the compliance with NEPA, such as reasonable alternatives to the proposed action. Because we have held that the permit was improperly issued under the provisions of § 122.4(i), including clauses (1) and (2), these NEPA issues need not be considered at this time.

V. CONCLUSION

Because the issuance of the NPDES Permit to Carlota Copper Mine was based on errors of law under the Clean Water Act, 40 C.F.R. § 122.4(i), and

the NEPA, we vacate and remand the permit to the EPA for further proceedings consistent with this opinion.

VACATED and REMANDED.

BEFORE THE ENVIRONMENTAL APPEALS BOARD UNITED STATES ENVIRONMENTAL PROTECTION AGENCY WASHINGTON, D.C.

In re: Carlota Copper Company NPDES Permit No. AZ0024112	NPDES Appeal Nos. 00-23 & 02-06

[Decided September 30, 2004]

ORDER DENYING REVIEW

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

NPDES Appeal Nos. 00-23 & 02-06

ORDER DENYING REVIEW

Decided September 30, 2004

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Stein:

I. *INTRODUCTION*

In July 2000, U.S. Environmental Protection Agency ("EPA" or "Agency") Region IX (the "Region")

issued a National Pollutant Discharge Elimination System ("NPDES")[1] permit decision (the "Permit"), number AZ0024112 (the "Permit"), to the Carlota Copper Company ("Carlota"). The Permit authorizes Carlota to discharge from its proposed open-pit copper mine project located near Miami, Arizona (the "Project"). On August 25, 2000, Friends of Pinto Creek, the National Wildlife Federation, the Arizona Wildlife Federation, Grand Canyon Chapter of the Sierra Club, Mineral Policy Center, Maricopa Audubon Society, and Citizens for the Preservation of Powers Gulch and Pinto Creek (collectively the "Petitioners") timely filed a petition requesting that the Environmental Appeals Board ("EAB" or "Board") review the Permit.[2] *See* Petition for Review of NPDES Permit (Aug. 24, 2000) ("First Petition").

Thereafter, the Region withdrew two conditions of the Permit and asked the EAB to stay its consideration of the First Petition.[3] *See* Notification to

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[1] Under the Clean Water Act ("CWA"), persons who discharge pollutants from point sources into waters of the United States must have a permit in order for the discharge to be lawful. CWA § 301, 33 U.S.C. § 1311. The National Pollutant Discharge Elimination System is one of the principal permitting programs under the CWA. *See* CWA § 402, 33 U.S.C. § 1342.

[2] On September 7, 2000, Carlota filed a motion to intervene and requested leave to file a responsive pleading and otherwise participate in this proceeding, which request the EAB granted by order dated September 11, 2000.

[3] The Region withdrew Permit Condition I.11.a ("Reclamation Work Required Prior to Discharging into Pinto Creek") and Permit Condition I.11.b ("Wellfield Mitigation Program").

Board and Interested Parties of Withdrawal of Permit Conditions and Request for Stay of Petitions (Nov. 9, 2000). The EAB granted the Region's request for a stay.[4] Order Staying Proceedings in Part (Dec. 5, 2000). The Region then opened a new public comment period on the withdrawn conditions. On February 27, 2002, the Region reissued the Permit. The reissued Permit contained the two conditions previously withdrawn, supported this time by an Amended Record of Decision ("ROD") and a Finding of No Significant Impact ("FONSI"). Thereafter, on April 1, 2002, the Petitioners filed a second petition, this time seeking review of the Region's February 27, 2002 decision to reissue the two withdrawn conditions of the Permit. *See* Petition for Review of NPDES Permit (Mar. 29, 2002) ("Second Petition").

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[4] At the time of the Board's Order, the Board had before it two petitions for consideration – the First Petition described above, and a petition by the Hopi Tribe ("Hopi Tribe Petition") – both seeking review of the Region's decision to issue Permit AZ0024112 to Carlota. In its November 9, 2000 request, the Region asked the Board to stay both petitions. *See* Notification to Board and Interested Parties of Withdrawal of Permit Conditions and Request for Stay of Petitions (Nov. 9, 2000). The Board stayed the First Petition but declined to stay consideration of the Hopi Tribe Petition, thereby staying the proceedings in part. *See* Order Staying Proceedings In Part (Dec. 5, 2000). The Board in a separate order denied review of the Hopi Tribe Petition. *See In re Carlota Copper Co.*, Order Denying Hopi Tribe Petition for Review, NPDES Appeal No. 00-24 (EAB Dec. 5, 2000).

For the reasons described below, we deny review of the Permit.

II. *BACKGROUND*

A. *Statutory and Regulatory Background*

1. *The Clean Water Act*

The CWA prohibits any person from discharging any pollutant into waters of the United States from a point source,[5] unless the discharge complies with the statutory requirements. CWA § 301(a), 33 U.S.C. § 1311(a). Section 402 of the CWA authorizes the EPA Administrator to issue permits for the discharge of pollutants, provided the discharge meets certain statutory requirements. CWA § 402(a), 33 U.S.C. § 1342(a). Section 402, in turn, provides that permitted discharges must, among other things, comply with sections 301 and 306. CWA § 402(a)(1), 33 U.S.C. § 1342(a)(1).

CWA section 301 provides for the inclusion in NPDES permits of two different kinds of effluent limits for point sources: those based on the technology available to treat a pollutant, and those necessary to protect the designated and existing uses of

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[5] The CWA defines a point source as "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." CWA § 502, 33 U.S.C. § 1362.

the receiving water body. The first type, known as technology-based limits, reflect a specified level of pollutant-reducing technology required for the type of facility that is seeking a permit. CWA § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A). The second type, known as water quality-based effluent limits, apply when technology-based effluent limits are insufficient to meet the applicable state water quality standards.

Under the CWA, states must develop water quality standards for all water bodies within the state. CWA § 303, 33 U.S.C. § 1313. These water quality standards, which states promulgate and then submit to EPA for approval, have three components: (1) one or more "designated uses" of each water body or water body segment; (2) water quality "criteria" specifying the amounts of various pollutants that the water may contain without impairing designated uses; and (3) an antidegradation provision. CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.10-.12. The first part, designated uses, basically classifies water bodies based on the expected beneficial uses of those water bodies and sets goals for the water body segment.[6] The second component, water quality criteria, are numeric or narrative criteria "expressed as constituent concentrations, levels or narrative statements" and designed to attain

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[6] *In re Teck Cominco Alaska Inc.*, NPDES Appeal No. 03-09, slip op. at 10 (EAB June 15, 2004), 11 E.A.D. ___ (citing U.S. EPA Office of Water, NPDES Permit Writers' Manual § 6.1.1, at 89 (1996)).

and maintain each designated use.[7] 40 C.F.R. § 131.3(b). The third part, the state's antidegradation policy, focuses on protecting "existing uses" by generally prohibiting degradation of water quality below that necessary to maintain existing uses. Existing uses are those uses actually attained in the water body on or after November 28, 1975. *Id.* § 131.3(e). Each state's antidegradation policy must comply with the federal antidegradation regulations codified at 40 C.F.R. § 131.12[8] and identify the methods to implement such policy.

The federal antidegradation policy establishes three tiers to protect water quality. The first tier consists of a minimum floor that protects all waters of the United States,[9] and it applies to Pinto Creek, the water body of interest in this case. *See infra* Part III.B.1.a. This tier requires maintaining and protecting all *existing uses* of a water body as well as the level of water quality necessary to preserve those uses. *See* 40 C.F.R. § 131.12(a)(1). This means that the water quality in the water body may be lowered

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[7] U.S. EPA Office of Water, NPDES Permit Writers' Manual § 6.1.1, at 89 (1996).

[8] U.S. EPA Office of Water, NPDES Permit Writers' Manual § 6.1.1, at 90 (1996).

[9] The EPA has described this provision as the "absolute floor of water quality in all waters of the United States." Water Quality Standards Regulation, 48 Fed. Reg. 51,400, 51,403 (Nov. 8, 1983); *see also* Water Quality Standards Regulation, 63 Fed. Reg. 36,742, 36,781 (July 7, 1998) (Advance Notice of Proposed Rulemaking); *Teck Cominco*, slip op. at 11, 11 E.A.D. at ___.

but only to the point where all existing uses are maintained and protected, and that it is not permissible to lower water quality such that existing uses are impaired.[10] Note that the first tier focuses on *existing* rather than *designated* uses.[11] The second and third tiers focus on protecting and maintaining "high quality" and "outstanding" water bodies, respectively. *See id.* § 131.12(a)(2)-(3). We will not concern ourselves here with the second and third tiers because it is undisputed that the State of Arizona has placed Pinto Creek in the first tier, rather than in these latter two categories.

The CWA also requires states to identify those water segments where technology-based effluent limits are insufficient to achieve the applicable water

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[10] *See* Proposed Water Quality Guidance for the Great Lakes System, 58 Fed. Reg. 20,802, 20,886 (Apr. 16, 1993).

[11] The EPA has explained the difference between these two concepts as follows:

> Designated uses are defined as those uses specified in water quality standards for each water body or segment whether or not they are being attained. EPA interprets existing uses as those uses actually attained in the water body on or after November 28, 1975 (the date of EPA's initial water quality standards regulation), whether or not they are included in water quality standards. 40 C.F.R. § 131.3(e). Designated uses focus on the attainable condition while existing uses focus on the past or present condition.

Teck Cominco, slip op. at 12, 11 E.A.D. at ___ (citing Water Quality Standards Regulation, 63 Fed. Reg. 36,742, 36,748 (July 7, 1998) (Advance Notice of Proposed Rulemaking)).

quality standards, and which are therefore "water quality limited." CWA § 303(d)(1)(A), 33 U.S.C. § 1313(d)(1)(A). Once a state identifies a segment as water quality limited, the statute requires the state to develop total maximum daily loads ("TMDLs") for that segment.[12] CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). A TMDL sets forth the total amount of a pollutant from point sources, nonpoint sources, and natural background that a water-quality limited segment can tolerate without violating water quality standards. 40 C.F.R. § 130.2(i). TMDLs consist of waste load allocations ("WLAs")[13] for point sources discharging into the impaired segment and load

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[12] In the instant case, Region IX, in collaboration with the Arizona Department of Environmental Quality ("ADEQ"), developed a TMDL for Pinto Creek. Generally, if a state fails to submit TMDLs for its impaired waters, the EPA may initiate the process of developing applicable TMDLs. In some cases, EPA may be obligated to develop federally created TMDLs in light of a state's lack of action to create its own. A few federal circuit courts, including the Ninth Circuit, have found such an obligation when a state "constructively submits" no TMDLs. Because this is not an issue in the instant case, we will not concern ourselves with the subtleties of the "constructive submission doctrine." For a discussion of the doctrine see *Ala. Ctr. for the Env't v. Reilly*, 762 F. Supp. 1422 (W.D. Wash. 1991); *Ala. Ctr. for the Env't v. Reilly*, 796 F.Supp. 1374 (W.D. Wash. 1992), *aff'd sub nom. Ala. Ctr. for the Env't v. Browner*, 20 F.3d 981 (9th Cir. 1994).

[13] The regulations define the term "waste load allocation" as "[t]he portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation." 40 C.F.R. § 130.2(h).

allocations ("LAs")[14] for nonpoint sources and natural background.

Section 306 establishes additional limitations that apply only to "new sources." CWA § 306, 33 U.S.C. § 1316. The CWA defines the term "new source" as "any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance, which will be applicable to such source," if such standard is promulgated in accordance with CWA section 306. CWA § 306(a)(2), 33 U.S.C. § 1316(a)(2); *see also* 40 C.F.R. § 122.2 (regulatory definition of "new source"). EPA has promulgated such standards for a wide array of point source categories, including ore mining and the subcategory of copper, lead, zinc, gold, silver, and molybdenum ore mines applicable to Carlota's proposed project. *See* 40 C.F.R. pt. 440, subpt. J. The parties here do not dispute that Carlota's proposed open-pit copper mine would be a "new source" within the meaning of section 306(a)(2) of the CWA and 40 C.F.R. § 122.2.

As discussed more fully below, the CWA and its implementing regulations also provide that, in certain circumstances, the EPA must comply with the National Environmental Policy Act ("NEPA"), 42

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[14] The term "load allocation" means "the portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources." 40 C.F.R. § 130.2(g).

U.S.C. §§ 4321-4370e, when issuing an NPDES permit. *See* CWA § 511(c)(1), 33 U.S.C. § 1371(c)(1); *see also* 40 C.F.R. § 122.29(c). More specifically, when the Agency issues an NPDES permit to a "new source," as defined in CWA section 306, the Agency must comply with NEPA's procedural requirements. *See* CWA § 511(c)(1), 33 U.S.C. § 1371(c)(1); *see also* 40 C.F.R. § 122.29(c)(1)(i).

2. *The National Environmental Policy Act*

NEPA is an "action-forcing" statute,[15] intended to "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man" and "enrich the understanding of the ecological systems and natural resources." NEPA § 2, 42 U.S.C. § 4321. NEPA's requirements are procedural, in that they call upon federal agencies to examine the environmental consequences of possible agency actions. *See In re Dos*

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[15] *See Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 n.14 (1989) ("The term 'action forcing' was introduced during the Senate's consideration of NEPA, * * * and refers to the notion that preparation of an [environmental impact statement] ensures that the environmental goals set out in NEPA are 'infused into the ongoing programs and actions of the Federal Government,' 115 Cong. Rec. 40416 (1969) (remarks of Sen. Jackson)."); *see also Kleppe v. Sierra Club*, 427 U.S. 390, 409 n.18 (1976); 40 C.F.R. § 1500.1(a) (1987) (stating that NEPA § 102(2)(C) is an action-forcing provision intended to assure that all agencies consider the environmental impact of their actions in decisionmaking).

Republicas Res. Co., 6 E.A.D. 643, 647 (EAB 1996). Accordingly, NEPA does not mandate any particular substantive results. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989). As the Court stated in *Robertson*: "Although these procedures are almost certain to affect the agency's substantive decision, it is well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. * * * NEPA merely prohibits uninformed – rather than unwise – agency action." *Id.* By focusing the agency's attention on the environmental consequences of possible agency action, "NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed." *Id.* at 349. NEPA's action-forcing procedures require agencies to take a "hard look"[16] at environmental consequences and to broadly disseminate relevant environmental information. *Id.* at 350.

The environmental impact statement ("EIS") requirement comprises the heart of NEPA. This provision mandates that federal agencies compile and consider detailed information on the environmental impact of the proposed federal action, adverse environmental effects that cannot be avoided if the proposal is implemented, alternatives to the proposed action, the relationship between local short-term uses of the human environment and the maintenance and

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[16] *See* discussion *infra* Part III.C.2.b.

enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources that would be involved in the proposed action if it is implemented. NEPA § 102(2)(C)(i)-(v), 42 U.S.C. § 4332(2)(C)(i)-(v); *see* 40 C.F.R. pts. 1502, 1508 (NEPA EIS regulations and definitions promulgated by the Council on Environmental Quality ("CEQ"),[17] which apply to all federal agencies); 40 C.F.R. pt. 6 (EPA-specific NEPA regulations); *see also In re Phelps Dodge Corp.*, 10 E.A.D. 460, 473 (EAB 2002).

Each agency action does not necessarily require the preparation of an EIS. Under NEPA, a federal agency must prepare an EIS *only* when the proposed action is a "major federal action *significantly affecting* the quality of the human environment." NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (emphasis added).

B. *Factual and Procedural Background*

1. *Overview*

Carlota has proposed to construct, operate, and reclaim an open-pit copper mine and associated

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[17] In enacting NEPA, Congress created the CEQ in the Executive Office of the President. The CEQ is a three-member body composed of persons the President appoints, with the advice and consent of the Senate. Congress envisioned that the CEQ would be "exceptionally well qualified to analyze and interpret environmental trends and information of all kinds * * * and to formulate and recommend national policies to promote the improvement of the quality of the environment." NEPA § 202, 42 U.S.C. § 4342.

processing facilities on private land near the town of Miami in Gila and Pinal Counties, Arizona, and on lands the Globe Ranger District of the Tonto National Forest administers. The Tonto National Forest management determined that the proposed Project potentially would result in significant environmental impact, and thus it required an EIS. The U.S. Forest Service served as the lead agency and prepared a final EIS (the "FEIS"). The U.S. Army Corps of Engineers ("ACOE") and the Arizona Department of Environmental Quality ("ADEQ") participated as cooperating agencies.[18] The U.S. EPA played a role by filing comments on the draft EIS. *See* FEIS App. 2 G (Letter 1). Because the Project contemplates discharging pollutants into waters of the United States, that is, the Pinto Creek watershed, Carlota applied for an individual NPDES permit that would allow the discharges.

2. *The Project*

Three water drainage systems currently exist within the Project area: Pinto Creek, Haunted Canyon, and Powers Gulch. NPDES Permit Fact Sheet at

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[18] As explained more fully below, the Project contemplates constructing two diversion channels which, under CWA § 404, fall under the jurisdiction of the ACOE. *See* CWA § 404, 33 U.S.C. § 1344. The ACOE developed a supplemental environmental impact assessment ("ACOE's SEA") in January 1998 to address additional ACOE regulatory responsibilities that the FEIS did not cover.

3 (Sept. 1998) ("Fact Sheet"). Powers Gulch drains into Haunted Canyon, which in turn drains into Pinto Creek north of the Project area. Pinto Creek ultimately drains into Roosevelt Lake. *Id.* Carlota's proposed Project would impact Pinto Creek and Powers Gulch.

More specifically, Carlota contemplates creating two diversion channels that would divert surface and ground water away from the main mining pit in Pinto Creek and away from a sulfuric acid heap leach facility in Powers Gulch. The Pinto Creek diversion channel would eliminate approximately 5,300 feet of the existing Pinto Creek stream, while the Powers Gulch diversion channel would eliminate approximately 7,300 feet of Powers Gulch stream. *Id.* at 2. Carlota has obtained a permit under section 404 of the CWA that allows and governs the creation of the two diversion channels. *See Carlota Copper Project 404 Permit*, Permit No. 944-0899 (Jan. 23, 1998).

The proposed Project, as the Region described it in the Fact Sheet, "would consist of open pits, a solvent extraction/electrowinning (SX/EW) plant, heap leach pad, process solution ponds, waste rock disposal areas, and ancillary facilities." Fact Sheet at 2. Carlota's plans call for the mine pits to drain internally so that "there will be no discharges of mine water during operations." *Id.* Carlota will also design the leach system as a "closed loop system." Carlota intends to line the heap leach pad and solution ponds with synthetic liners so that "there will be no discharges from the leach system." *Id.*

Carlota plans to use five separate areas for waste rock disposal. Two disposal areas would consist of backfill to the Carlota/Cactus pit and the Eder pit. *Id.* Carlota plans to construct three other waste rock disposal areas, consisting of waste rock dumps: (1) the Main Dump; (2) the Cactus Southwest Dump; and (3) the Eder Dump. *Id.* Downgradient from the faces of the Main Dump and the Eder Dump, Carlota will build seven storm water and sediment retention basins, or retention ponds, to capture storm water runoff and sediment from the slopes of the waste rock dumps. *Id.* at 3-4. The basins will contain outlet structures to release storm water if a storm event exceeds the design criteria. *Id.* These outlets, where discharges could occur during large precipitation events, are outfalls that require an NPDES permit. *Id.* at 4.

There will be seven of these outfalls: four from retention ponds designed to collect and manage storm runoff from the west side of the Main Dump (Nos. 001 to 004), one from the retention pond designed to collect and manage storm runoff from the north and east sides of the Main Dump (No. 005), and two from the retention ponds designed to collect and manage storm runoff from the east side of the Eder Dump (Nos. 006 & 007). *Id.* at 4, 6. All of these retention ponds and outfalls will have a similar design. Carlota will build the ponds using rock embankments and will design them to hold ten times the average annual sediment yield associated with the respective drainage area. *Id.* at 4-6. The Permit requires periodic

removal of sediments, and Carlota will in turn place the removed sediments on top of the waste rock dumps. *Id.* Each pond will retain runoff from precipitation events less than the design criteria, and disposal will occur through evaporation. *Id.* Discharges from precipitation events that exceed design criteria will be "through a 'Morning Glory' type outlet (i.e., a screened vertical pipe inside the retention pond), if the depth of storm water within the pond exceeds the top level of the outlet pipe." *Id.* at 4-5.

In a precipitation event that exceeds design capacity by ten percent, the retention ponds are estimated to have a ninety-five percent trap efficiency for the collection of sediments. *Id.* at 5-7. Carlota will design the retention ponds associated with Outfall Nos. 001 to 004 and 006 to 007 so that discharges would occur only from storm events that exceed the volume of runoff from a 10-year, 24-hour precipitation event. *Id.* at 4-6. All of these outfalls will discharge into Powers Gulch. The retention pond associated with Outfall No. 005 will be designed so that discharges will occur only for storm events that exceed the volume of runoff from a 100-year, 24-hour precipitation event. *Id.* at 5. This outfall is the only storm water discharge point that will discharge directly into Pinto Creek and Haunted Canyon Creek.

The Project will need a water supply of, on average, 590 gallons per minute ("gpm"). In order to partially satisfy the Project's needs, Carlota will develop a water supply wellfield along Haunted Canyon and Pinto Creek to provide supplemental

water for the Project. The Forest Service determined that pumping from this wellfield might reduce stream flows in Haunted Canyon and Pinto Creek. Accordingly, the Forest Service required Carlota to develop mitigation measures, which include augmenting the stream flows with either ground water pumped from the wellfield or water from other suitable sources. This creates an eighth outfall (No. 008), which the NPDES regulations also govern.

3. *Procedural Background*

In September 1998, the Region issued an NPDES draft permit and published notice that the public could comment on the draft permit from September 29, 1998, through December 31, 1998 (hereinafter the "1998 Public Comment Period" or "First Public Comment Period"). During the First Public Comment Period, the Region held two public hearings on the draft permit, one on November 12, 1998, in Mesa, Arizona, and the second on November 13, 1998, in Globe, Arizona. The Region received approximately 1,000 comments on the draft permit, including comments from the Petitioners.

The draft permit would have authorized discharges of storm water from Outfalls Nos. 001 through 007, but it did not authorize mitigation discharges to augment the Haunted Canyon and Pinto Creek stream flows (Outfall No. 008). The Petitioners' comments, among other things, argued that Carlota needed an NPDES permit for any such

mitigation discharges. After the public comment period concluded, Carlota amended its permit application to request permission to discharge into Haunted Canyon to augment the stream flow. In addition, in response to comments concerning copper loading in Pinto Creek, Carlota proposed to partially remediate the nearby Gibson Mine to offset discharges of copper from Outfalls Nos. 001 through 007.

On June 30, 2000, the ADEQ certified the Permit pursuant to section 401 of the CWA.[19] Thereafter, on July 24, 2000, the Region issued the final Permit to Carlota. The final Permit contained conditions authorizing mitigation discharges from Outfall No. 008, and it required Carlota to partially remediate Gibson Mine before discharging from Outfalls Nos. 001 through 007.

As already noted, the CWA requires the Region to conduct a NEPA review before the Region could issue the NPDES Permit to Carlota.[20] In making the July 2000 permit decision, the Region relied on the NEPA

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[19] All NPDES permit applicants must obtain a certification from the appropriate state agency validating the permit's compliance with the pertinent federal and state water pollution control standards. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1). EPA may not issue a permit until the state in which the discharge originates grants or waives certification. 40 C.F.R. § 124.53(a). The regulations further provide that "when certification is required * * * no final permit shall be issued * * * [u]nless the final permit incorporates the requirements specified in the certification." *Id.* § 124.55(a).

[20] *See* CWA § 511(c)(1), 33 U.S.C. § 1371(c)(1).

analyses the Forest Service and the ACOE had prepared. *See* Fact Sheet at 20. During the First Public Comment Period, the public could comment on the Region's decision to adopt these NEPA documents. *See* Response to Comments on the Following EPA Proposed Actions: Issuance of an NPDES Permit and Adoption of NEPA Documents: FEIS, U.S. Forest Service, July 1997 and SEA, ACOE, January 1998 [hereinafter Response to Comments First Public Comment Period].

Dissatisfied with the Region's July 2000 decision, Petitioners timely filed their First Petition with the Board, which argued, among other things, that: (1) because Pinto Creek is a water quality-limited segment, the Region must develop and implement a TMDL before issuing a permit to a new source; thus, the Region could not issue a permit to Carlota until the TMDL process takes place; (2) the Region did not properly provide the public with notice of the two new permit conditions governing the Gibson Mine partial remediation and the discharges from Outfall No. 008; (3) Carlota must obtain an NPDES permit for discharges associated with the Gibson Mine; and (4) the Region should not have relied solely on the FEIS and the ACOE's SEA to fulfill its NEPA requirements because those documents did not consider the environmental impacts of the Gibson Mine cleanup and the mitigation discharges from Outfall 008 into Haunted Canyon. *See* First Petition at 7, 21, 35, 46.

On November 7, 2000, pursuant to 40 C.F.R. § 124.19(d), the Region withdrew the two contested

permit conditions so that the public could comment on these conditions. The Region asked the Board to stay the remaining conditions of the Permit; as noted in Part I above, we granted this request through an order dated December 5, 2000. On April 27, 2001, the Region approved a Final Total Maximum Daily Load for Copper in Pinto Creek, Arizona (the "Pinto Creek TMDL"). Thereafter, on May 9, 2001, the Region provided an opportunity for the public to comment on the two withdrawn permit conditions – Permit Conditions I.A.11.a & .b – and on a supplemental environmental assessment EPA prepared (the "Region's SEA") analyzing these conditions of the Permit under NEPA's requirements. The public comment period ran from May 9, 2001, through June 25, 2001 (the "2001 Public Comment Period" or "Second Public Comment Period"). The ADEQ issued a new section 401 certification on February 8, 2002.[21] *See* Region's Response to

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[21] The ADEQ Section 401 Certification states as follows:

> On June 30, 2000, the [ADEQ] provided certification under Section 401 of the [CWA] for a proposed NPDES permit * * * . This permit was subsequently appealed, and EPA advises that it is finally being issued without changes to any of the permit conditions. Based on this understanding and with consideration that Arizona water quality standards have not changed for this area, we consider the previous certification to still be applicable and the permit to be protective of the water quality requirements of the State of Arizona.

Region's Response Ex. 17 (Letter from Karen L. Smith, Director, Water Quality Division, ADEQ, to Terry Oda, U.S. EPA Region 9 (Feb. 8, 2002)).

Petition for Review ("Region's Response") Ex. 17 (Letter from Karen L. Smith, Director, Water Quality Division, ADEQ, to Terry Oda, U.S. EPA Region 9 (Feb. 8, 2002)).

Based on its NEPA analysis, the Region made "a finding of no significant impact" ("FONSI"), determining that it did not have to develop its own EIS because the FEIS along with the ACOE's SEA and the Region's SEA collectively met NEPA' s requirements. *See* Amended Record of Decision/Finding of No Significant Impact (Feb. 27, 2002) ("ROD/FONSI"). Thus, on February 27, 2002, the Region reissued the withdrawn conditions of the Permit along with an amended ROD and a FONSI.

On April 1, 2002, Petitioners filed a second petition, arguing, among other things, that: (1) the Region failed to properly regulate discharges from the Project site; (2) the discharges from the Project violate the CWA; and (3) the Region violated NEPA. *See* Second Petition at 2, 15, 27. The Region filed its response on June 17, 2002. *See* Region's Response. On June 21, 2002, Carlota filed a response to both Petitions and a motion to dismiss. *See* Response of Intervenor Carlota Copper Company to Petitions for Review and Motion to Dismiss ("Carlota's Response"). On July 24, 2002, Petitioners filed a third brief, this time a consolidated reply in response to the Region's and Carlota's responses. *See* Petitioners Consolidated Reply ("Reply Brief").

The Board held oral argument on October 24, 2002, during which the Board questioned Petitioners, the Region, and Carlota about several issues the Board had previously identified. *See* Order Regarding Oral Argument (Oct. 15, 2002). Following oral argument, the Board ordered the Region to respond to further questions that arose out of the oral argument. *See* Order for Additional Briefing (Jan. 14, 2003). The Region and Carlota filed supplemental briefs on March 11, 2003. *See* Supplemental Brief of EPA Region 9 ("Region's Supplemental Brief"); Response of Intervenor Carlota Copper Company to Order for Additional Briefing ("Carlota's Additional Briefing"). On March 25, 2003, Petitioners filed a consolidated response to the supplemental briefs the Region and Carlota filed. *See* Petitioner's Consolidated Response to the Supplemental Briefs Filed by Region 9 of the Environmental Protection Agency and the Carlota Copper Company ("Petitioners' Response to the Supplemental Briefs").[22]

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[22] On April 13, 2003, Petitioners filed a notice of supplemental authority requesting that the Board consider in its decision-making a recent case issued by the Federal Court of Appeals for the Ninth Circuit – *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, 325 F.3d 1155 (9th Cir. 2003). In their motion, Petitioners explain how, in their view, the cited case is relevant to some of the issues Petitioners raise on appeal. On April 25, 2003, Carlota filed a motion for leave to file a response to Petitioners' notice of supplemental authority. While we take official notice of the case, we nonetheless deny Petitioners' motion and reject Petitioners' attempt to further argue their

(Continued on following page)

III. *DISCUSSION*

Under the rules governing this proceeding, the Board ordinarily will not review an NPDES permit unless the Region based the permit on a clearly erroneous finding of fact or conclusion of law or the permit appeal raises an important matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a); *see In re Phelps Dodge Corp.*, 10 E.A.D. 460, 471 (EAB 2002); *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 333 (EAB 2002). In reviewing NPDES permits, the Board is guided by the concept articulated in the preamble to the part 124 permitting regulations, which states that the Board's power of review "should be only sparingly exercised" and that "most permit conditions should be finally determined at the [r]egional level." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *accord In re City of Moscow*, 10 E.A.D. 135, 141 (EAB 2001).

Petitioner bears the burden of demonstrating that the Board should review the permit. First, a petitioner seeking review must demonstrate that any issues it raises on appeal have been preserved for Board review. 40 C.F.R. §§ 124.13, .19. *See City of Moscow*, 10 E.A.D. at 141; *In re City of Phoenix*, 9 E.A.D. 515, 524 (EAB 2000), *appeal dismissed per stipulation*, No. 01-70263 (9th Cir. Mar. 21, 2002). Assuming the issues have been preserved, the

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case. In light of our disposition of Petitioners' motion, we deny Carlota's motion for leave to file a response brief.

petitioner must then state its objections to the permit and explain why the permit issuer's previous response to those objections is clearly erroneous, an abuse of discretion, or otherwise warrants review. 40 C.F.R. § 124.19(a); *see In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 668 (EAB 2001); *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 71-72 (EAB 1998). Significantly, a petitioner seeking review of issues that are technical in nature bears a heavy burden because the Board generally defers to the Region on questions of technical judgment. *Town of Ashland*, 9 E.A.D. at 667; *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999).

As previously stated, Petitioners have grouped their arguments into three broad categories. Petitioners argue that: (1) the Project will produce pollutant discharges to waters of the United States that the Permit does not regulate, *see* Second Petition at 2-15; (2) the discharges from the Project that the Permit does regulate will violate the CWA because a number of discharges will, or potentially will, violate Arizona's water quality standards and its antidegradation requirements, *id.* at 15-26; and (3) the Region's permitting decision violates NEPA because the Region failed to consider a reasonable range of feasible alternatives, predetermined the outcome of the FONSI, and failed to take the required "hard look" at the impacts from the discharges. *Id.* at 27-40.

As explained in more detail below, we deny review of the Permit. With regard to Petitioners' first category of arguments, Petitioners failed to show that some of those arguments were preserved for Board review, *see infra* Parts III.A.2-.3, and where the arguments were preserved, Petitioners failed to show that the Region clearly erred by not requiring Carlota to apply for a permit to cover discharges from the Gibson Mine site during remediation, *see infra* Part III.A.1. With regard to the arguments raised in the second category, our examination of the record shows that the Permit does not violate Arizona water quality standards for copper and temperature, as Petitioners claim, *see infra* Parts III.B.1.a-.b, and that the Region did not violate the requirements of 40 C.F.R. § 122.4(i), *see infra* Part III.B.2. Finally, as to Petitioners' arguments that the Region violated NEPA, we find, as with the first category, that Petitioners failed to preserve for Board review some of the arguments in support of their claim; and with respect to those arguments that were preserved, Petitioners did not meet their burden to show clear error. Our analysis follows.

A. *Discharges That Petitioners Contend the Permit Should Regulate*

Petitioners identify three sources of pollutant discharges that Petitioners claim the Permit should, but does not, cover: (1) discharges from the Gibson Mine site during and after the partial remediation of that site, *see* First Petition at 35-43; Second Petition

at 14-15; (2) discharges from the two diversion channels Carlota intends to build in Pinto Creek and Powers Gulch to divert surface and ground water flows from the main Carlota/Cactus pit and the sulfuric acid leach facility, *see* Second Petition at 3-11; and (3) discharges from abandoned mines located on property allegedly controlled or claimed by Carlota, *see id.* at 11-12.

1. *Discharges from the Gibson Mine Reclamation*

Petitioners challenge the proposed Gibson Mine partial reclamation portion of the Project from two different perspectives. Petitioners first argue that the reclamation work itself requires an NPDES permit because pollutants will be discharged from the Gibson Mine site. We will consider this argument in this section of our decision, Part III.A.1. Petitioners also object to certain aspects of the proposed use of the Gibson Mine partial reclamation to offset Carlota's discharges. We will consider these arguments in a later part of this decision, Part III.B.1.a.

We begin by reviewing Petitioners' argument, which has changed during the course of this appeal. In their First Petition, Petitioners argued that discharges from the Gibson Mine site must be regulated by *an NPDES permit*. First Petition at 35-43. Petitioners claimed that an NPDES permit is required because: (1) the Gibson Mine is, or contains, a point source; (2) Carlota would add pollutants to navigable

waters of the United States; and (3) Carlota would be an operator of the Gibson Mine. *Id.* Petitioners also claimed that because the Region based its decision to authorize Carlota's discharges on Carlota's successful reduction of copper loading at the Gibson site, requiring an NPDES permit for Carlota at the Gibson Mine would ensure that the offset is successful. *See id.* at 44-46. Petitioners stated their conceits as follows:

> The requirement for a[n] NPDES permit at Gibson will help ensure that the "offset" has actually occurred and that copper loadings have been reduced as planned. Such a permit would necessarily include upstream and downstream monitoring and compliance points to gauge the effectiveness of the remediation work. In addition, such permit-required monitoring will determine if the loadings are indeed eliminated forever, rather than just temporarily abated. * * * Such long-term monitoring is especially important given the projected 20-year operating life of the Mine.

Id. at 44.

In their Second Petition, Petitioners also argue that the Region failed to require an NPDES permit for Carlota's work as an operator of the Gibson Mine site. Second Petition at 3. The theory Petitioners advance in the Second Petition, however, is that the Agency has, allegedly, a mandatory duty to regulate unpermitted discharges, and therefore, the Region clearly erred by failing to require an NPDES permit for Carlota's work as an operator of the Gibson Mine.

Id. at 13. Premised on the existence of such a duty, Petitioners request that the Region issue an NPDES permit to Carlota as an operator of the Gibson Mine site and also issue another NPDES permit to the landowners of the site. *Id.* at 14.

In their Reply Brief, Petitioners' focus evolved again; in this brief, they expressly claim that *this NPDES Permit* (i.e., the same NPDES Permit authorizing the discharges at the Carlota project), as opposed to a potentially separate NPDES permit, must regulate the post-remediation discharges from the Gibson Mine site. Reply Brief at 29. In their Reply Brief, Petitioners raise concerns that *this Permit* did not contain monitoring conditions to determine whether the Gibson cleanup is successful. In Petitioners' words, having post-remediation monitoring "would eliminate the very real possibility that while the discharges may be reduced in the short-term, pollution levels could creep back in the long-term." Reply Brief at 31.

The Region, for its part, argues that the issue of whether EPA has a mandatory duty to regulate all unpermitted discharges, including the Gibson Mine, was never raised during the public comment periods and, therefore, was not preserved for Board review. *See* Region's Response at 8. In addition, the Region maintains that Petitioners' arguments do not warrant Board review because the arguments do not constitute a challenge to a permit condition. *Id.* at 10-11. Carlota raises a similar argument in its response. Carlota argues that 40 C.F.R. § 124.19 "does not

authorize review based upon the absence of conditions in a permit" and that "Petitioners' request for the addition of conditions authorizing other discharge points does not meet this requirement and should be rejected." Carlota's Response at 13.

In any event, the Region argues, its decision to not require a permit covering remediation activities at the Gibson site is justified. The Region explains on appeal that it decided not to require an NPDES permit for Carlota's remediation because Carlota does not intend to discharge during remediation and Carlota's partial remediation of a small portion of the Gibson Mine site will not transform Carlota into an operator of the entire site such that it would be liable for all discharges from the site after completion of the remediation. *See* Region's Response at 22-26.

At the outset, we reject the Region's assertions that Petitioners did not preserve the issue of the Region's alleged duty to require an NPDES permit for the Gibson Mine remediation activities. Because the Gibson Mine offset was not proposed during the First Public Comment Period, Petitioners had no obligation to raise a concern that the offset required an NPDES permit during that period. During the Second Public Comment Period, Petitioners specifically argued that Carlota needed an NPDES permit for its work at the Gibson Mine, and Petitioners incorporated by reference in those comments the arguments they raised in the First Petition objecting to the inclusion of the Gibson Mine offset without a prior opportunity to comment on this issue. *See* Comments of Friends of

Pinto Creek, et al., Letter from Roger Flynn, Western Mining Action Project, & Kimberly J. Graber, National Wildlife Federation 5 (June 21, 2001) ("[T]he EPA fails to ensure that Carlota obtain a CWA § 402 discharge permit for its work at the Gibson site. *See* Friends of Pinto Creek's EAB appeal (incorporated herein by reference).").

In addition, we reject Carlota's effort to characterize Petitioners' contention that the Permit should contain discharge limits applicable to the Gibson Mine remediation as improperly seeking the "addition of permit conditions" or improperly seeking review based upon "the absence of permit conditions." Similarly, we are not persuaded by the Region's contention that Petitioners' arguments do not challenge a permit condition. We view the remediation work that Carlota proposes to perform at the Gibson Mine site as part of the Permit allowing Carlota's discharges at the Project since the Permit itself makes discharges at the Project contingent upon Carlota's partial remediation of the Gibson Mine. Specifically, Petitioners have raised these issues as part of their request that we review Permit Conditions I.A.1 and I.A.11.a, which require Carlota to partially remediate the Gibson Mine site before discharging from any of the eight outfalls listed in the Permit. Therefore, the question whether the conditions requiring partial remediation must contain further limitations to ensure the success of the offset falls within our jurisdiction "to review any condition of the permit decision." 40 C.F.R. § 124.19.

Accordingly, having rejected the foregoing arguments of the Region and Carlota, we now consider: (1) whether the Region had a mandatory duty to issue or require an NPDES permit for the remediation work at the Gibson Mine site; (2) whether the Region abused its discretion in not requiring Carlota to obtain such a permit; and (3) whether the Region clearly erred by not including post-remediation conditions in Carlota's Permit.

As discussed more fully below, Petitioners have not cited any authority, and we are unaware of any, that mandates that the Agency must issue or require Carlota to apply for an NPDES permit to cover alleged discharges from the Gibson Mine site. Nor have Petitioners shown that the Region clearly erred or abused its discretion in not requiring Carlota to take such action. Finally, as to whether *this Permit* should contain conditions to ensure the success of remediation, we find that Petitioners failed to preserve this particular issue for Board review. We address the specifics of each of these issues in turn.

a. *Whether the Region Had a Mandatory Duty to Issue or Require a Permit*

Petitioners rely on section 123.1(g)(1) of 40 C.F.R.[23] and several court cases to support their

[23] Petitioners cite to section 123.2(g)(1). As there is no section 123.2(g)(1), we construe this as a typographical error, and read it instead as section 123.1(g)(1).

proposition that EPA must "regulate all known discharges" and, therefore, the Region was required to either issue a permit to Carlota that would cover discharges from the Gibson Mine or require Carlota to apply for such a permit. *See* Second Petition at 13. Petitioners also rely on section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), to further bolster their argument. *Id.* at 14. According to Petitioners, EPA has a nondiscretionary duty to take corrective action, which includes issuing permits to known dischargers. *Id.*

Neither the cases nor the provisions Petitioners cite stand for the proposition Petitioners urge the Board to adopt. Section 123.1, the first authority Petitioners cite, merely states the procedures EPA will follow in approving a state NPDES program and the requirements a state must meet in order for the Administrator to approve its program. In particular, section 123.1(g)(1) provides: "[T]he [s]tate program must prohibit all point source discharges of pollutants." 40 C.F.R. § 123.1(g)(1). Petitioners suggest we derive from this specific section a mandatory obligation on EPA's part to take specific action in the form of issuing permits or requiring the owner or operator of a particular site with illegal discharges to apply for a permit. We do not read the section in this narrow way, and we disagree that such mandatory duties flow from this section.[24] That the state permit

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[24] The agency's discretion to act is different from a discharger's or prospective discharger's duty to apply. As explained below, a discharger or potential discharger of pollutants has an

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program must prohibit all point source discharges does not, without more, limit EPA's discretion to prioritize its permitting activities or to make choices about how best to bring facilities into compliance. The interpretation Petitioners propose is clearly in conflict with the well-settled principle that an agency decision whether to act against a violator falls within its discretionary authority. As the Supreme Court has stated:

> [A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. *The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.*

Heckler v. Cheney, 470 U.S. 821, 831 (1985) (emphasis added); *accord In re Borough of Ridgeway*, 6 E.A.D.

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obligation to apply for an NPDES permit to, if granted, lawfully discharge into waters of the United States.

479, 494 (EAB 1996) (stating that EPA is "entitled to flexibility in its choice of an enforcement action to the fullest extent consistent with the statute").

In keeping with the principles laid out in Heckler, we also reject Petitioners' reliance on section 309(a)(3) of the CWA as authority for the mandatory duty Petitioners claim – that EPA has to issue an NPDES permit in this case. Section 309(a)(3) reads as follows:

> Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

CWA § 309(a)(3), 33 U.S.C. § 1319(a)(3). This subsection addresses enforcement mechanisms available to the Administrator upon the finding of a violation.[25] Notably, it does not state that upon finding a violation, the Administrator must issue a permit. Rather,

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[25] Indeed, section 309 of the CWA is titled "Enforcement," and subsection (a) is titled "State Enforcement Orders."

it provides that *upon finding of a violation*, the Administrator "shall issue an order requiring such person to comply" *or* "bring a civil action."[26] These actions, the issuance of a compliance order and initiation of enforcement action, are consistent with the well-established principle that EPA retains discretion as to how to bring facilities into compliance and inconsistent with Petitioners' suggestion that EPA's *sole* option is the mandatory issuance of a permit. *See Heckler*, 470 U.S. at 831.

We find support for our interpretation in a recent Tenth Circuit decision, *Bravos v. EPA*, 324 F.3d 1166 (10th Cir. 2003), which held that this section does not mandate issuance of an NPDES permit. *Bravos*, 324 F.3d at 1173. There, the court stated, "The view that § 309(a)(3) does not restrict the Administrator's discretion is in keeping with the Supreme Court's pronouncements [in *Heckler v. Cheney*, 470 U.S. 821, 831 (1985)]," *id.* at 1171, and "[e]ven if § 309(a)(3) mandates certain action, it certainly did not mandate what the EPA ended up doing in this case [that is, issuing a permit]." *Id.* at 1173.

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[26] We also note that this is not a case where a finding of violation within the meaning of section 309(a)(3) has been made. *See Bravos v. EPA*, 324 F.3d 1166, 1172 (10th Cir. 2003) (rejecting plaintiff's argument that EPA had a nondiscretionary duty under CWA § 309 to take enforcement action against illegal discharger because, among other things, plaintiff failed to show that a finding of violation had been made by the delegated authority).

Moreover, Petitioners have not cited to any other provisions of the CWA, and we are unaware of any, that create the specific obligations Petitioners claim. *See Bravos*, 324 F.3d at 1173-74 (finding that a mandatory duty to issue permits does not follow from CWA sections 301(a), 301(e), 402(a)(1), and 309(a)(3)). Although a discharger of pollutants to waters of the United States has a duty under the CWA to *apply* for an NPDES permit to allow those discharges, this duty to apply for a permit differs from the duty Petitioners claim. The EPA simply does not have a mandatory duty, on its own initiative and in the absence of a permit application, to *issue* a permit to an illegal discharger. Likewise, pursuant to *Heckler*, EPA does not have a mandatory duty to compel an application for a permit, even though in many instances it will choose to take such action.

Petitioners also cite to a number of cases that they claim stand for the proposition that EPA has a mandatory duty to issue an NPDES permit. *See* Second Petition at 13. None of the cases on which Petitioners rely, however, convinces us that the Agency has a mandatory duty to either issue a permit or order a party to apply for a permit. For example, Petitioners rely on *United States v. Tom-Kat Development, Inc.*, 614 F. Supp. 613 (D. Alaska 1985), to support their contention that the CWA establishes an "unconditional and absolute" requirement that all illegal discharges have an NPDES permit. *Id.* at 614 (quoting *Kitlutsisti v. Arco Laska, Inc.*, 592 F. Supp. 835, 839 (D. Alaska 1984), *rev'd on other grounds*, 782

F.2d 800 (9th Cir. 1986)). Petitioners maintain that because the CWA establishes an "unconditional and absolute" requirement that illegal discharges be covered by NPDES permits, the Agency has a mandatory duty to issue permits to abate illegal discharges. Neither the *Tom-Kat* decision, nor the *Kitlutsisti* decision – the case relied upon by the court in *Tom-Kat* – stand for the particular proposition Petitioners propound. The court in *Tom-Kat* spoke about the duty to obtain a permit – a discharger's duty to obtain an NPDES permit before discharging pollutants into waters of the United States. In *Kitlutsisti*, the court also spoke about a different duty – EPA's duty to act promptly upon license applications. *Kitlutsisti*, 592 F. Supp. at 839. The court in *Kitlutsisti* stated that "because NPDES permits are licenses required by law, [section] 9(b) of the [Administrative Procedure Act] makes it mandatory that the EPA promptly process such permits."[27] *Id.*

Petitioners also mistakenly rely on *Natural Resource Defense Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977), for a similar proposition. In *Costle*, the court considered a challenge to an EPA

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[27] Petitioners omit that the court in *Kitlutsisti* declined to address a question similar to the one presented here. In *Kitlutsisti*, the court was asked to decide whether EPA had a duty to order Arco to apply for an NPDES permit, but the court declined review because, among others things, the controversy did not concern a mandatory duty of the Administrator and, therefore, the court did not have jurisdiction. *Kitlutsisti*, 592 F. Supp. at 840.

rulemaking in which the Agency exempted certain categories of point sources from the NPDES permit requirements. *Id.* at 1373. The Costle court stated: "The EPA Administrator does not have authority to exempt *categories* of point sources from the permit requirements of § 402." *Id.* at 1377 (emphasis added). Petitioners erroneously imply, based on this statement, that the Region's alleged failure to require an NPDES permit for the Gibson Mine at this time amounts to an illegal exemption of a known point source discharge. In our view, the categorical exemption at issue in *Costle* is notably different from the situation at hand. The case before the Board concerns not a *categorical* exemption tantamount to abandonment of EPA's statutory responsibilities, but rather, whether *in this particular instance*, the statute circumscribes the Region's discretion and mandates that it must issue an NPDES permit *to Carlota* for the Gibson Mine before Carlota may remediate part of the Gibson Mine as an offset for Carlota's proposed discharges at the Project. In essence, Petitioners urge that we overlook the fact that Carlota is not the owner of the Gibson Mine and will only be the operator of the site for, at most, a limited time period. This we will not do. We thus decline to hold that EPA has a mandatory duty to issue an NPDES permit to Carlota for discharges at the Gibson Mine site.

Costle also undermines Petitioners' arguments by highlighting the discretion the statute entrusts to the Administrator to either permit a discharge or leave it subject to the CWA section 301 discharge prohibition.

For example, the court in Costle stated that under section 402, "the Administrator has *discretion* either to issue a permit or to leave the discharges subject to the total proscription of [section] 301. This is the natural reading, and the one that retains the fundamental logic of the statute."[28] *Costle*, 568 F.2d at 1375 (emphasis added); *see Bravos v. EPA*, 324 F.3d 1166, 1174 (10th Cir. 2003) (pointing out that *Costle* merely stated that "the EPA must either issue a permit for the offending discharge or leave the discharger subject to the total prohibition expressed in [section] 301"). In this case, the Region maintains that if unpermitted discharges occur during the Gibson Mine partial remediation, EPA has the right to take an enforcement action against the discharger, and Petitioners can initiate a citizen suit action. Region's Response at 23. Therefore, we conclude that the Region's failure to issue or require an NPDES permit for the Gibson Mine in the context of this permit process is not a *de facto* categorical exemption for discharges that hypothetically may result from the Gibson Mine remediation. Accordingly, notwithstanding Petitioners' arguments, we cannot conclude that the Region had a mandatory duty to require Carlota

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[28] *See supra* Part II.A.1 (explaining CWA § 301 statutory prohibition against the discharge of pollutants into waters of the United States, and Agency's authority to issue permits allowing discharge of pollutants under section 402).

to apply for a permit that would cover any speculative discharges from the remediation at Gibson.[29]

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[29] Petitioners also cite to *Committee to Save the Mokelumne River v. East Bay Municipal Utility District* to illustrate that "at least one court has opined that the failure to require an NPDES permit for a point source discharge of pollutants would constitute an *ultra vires* act which the federal district would have subject matter jurisdiction to review." Second Petition at 13 (citing 35 Env't Rep. Cas. (BNA) 1537, 1543 n.10 (E.D. Cal. 1992)).

We do not find the court's expressions in *Mokelumne* binding here for several reasons. First, the facts in *Mokelumne* differ from the facts here because the defendant in *Mokelumne* had *in fact* discharged pollutants into navigable waters of the United States without a permit. In the instant case, there have been no discharges attributable to Carlota and such discharges remain at present hypothetical. Second, the question in *Mokelumne* was whether the district court had subject matter jurisdiction over plaintiffs claim, not whether the permitting authority had a mandatory duty to issue a permit or order the facility's owner/operator to apply for one. 35 Env't Rep. Cas. at 1541. Third, the court's expressions Petitioners rely on are *dicta*. The defendants in *Mokelumne* claimed that the state permitting authority determined that the facility in question did not require an NPDES permit. *Id.* The court found that the state had not made such a determination. *Id.* In dicta, the court observed that even if the state had determined that the facility was exempt from the NPDES permit requirements, that decision would not divest the court of subject matter jurisdiction over plaintiffs citizen suit. *Id.* The court, citing *Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055, 1060 (5th Cir. 1991), *NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977), and *Hudson River Fishermen's Ass'n v. City of New York*, 751 F. Supp. 1088, 1099 (S.D.N.Y. 1990), suggested that such an exemption would constitute an *ultra vires* act that the court would have jurisdiction to review pursuant to 28 U.S.C. § 1331. 35 Env't Rep. Cas. at 1543 n.10. We do not find either *Carr* or *Hudson River*

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b. *Whether the Region Clearly Erred or Abused Its Discretion in Not Requiring Carlota to Apply for a Permit*

We now consider whether, despite the lack of a mandatory duty to issue an NPDES permit, the Region nonetheless clearly erred or abused its discretion by failing to issue or require Carlota to apply for a permit for the work at the Gibson Mine. As previously noted, Petitioners claim in their First Petition that an NPDES permit is required because the Gibson Mine is, or contains, a point source, Carlota will add pollutants into Pinto Creek during and after remediation, and Carlota will become an operator of the site by performing the remediation work. First Petition at 37, 42-43.

As noted earlier, the Region argues that an NPDES permit for Carlota's remediation is not necessary because Carlota does not intend to discharge during remediation and Carlota will only operate a small portion of the Gibson site. The Gibson site, the Region represents, covers approximately 300 acres of land; the northerly portion of the site drains into the Pinto Creek watershed, while the southerly portion

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binding for the same reasons we do not regard *Mokelumne* of precedential value. The questions before those courts were not the one presented here. Rather, in those cases, the alleged violator had discharged pollutants into waters of the United States. Moreover, both cases heavily relied on *Costle* in support of their conclusions. As noted above, rather than strengthening Petitioners' position, the *Costle* decision weakens it.

drains into a different watershed – the Mineral Creek watershed. Region's Response at 24. Carlota will only remediate portions of the Gibson site that discharge into Pinto Creek. Thus, the Region argues, Carlota will not be responsible for all discharges from the site. *See id.* at 22-26.

Petitioners contend that the record lacks support for the Region's apparent conclusion that there will be no discharges during remediation. Reply Brief at 30. In considering whether the Region clearly erred or abused its discretion because it did not require Carlota to apply for an NPDES permit authorizing discharges from the Gibson Mine site during remediation, we first examine whether the record supports the Region's conclusion.

Recall that in its response on appeal, the Region first contended that Carlota does not intend to discharge during the remediation at Gibson. *See supra* Part III.A.1; Region's Response at 22. Specifically, the Region argued: "Petitioners are objecting to a future NPDES permit or a speculative illegal discharge. The time to challenge the former is at the time of the issuance of any future permit." Region's Response at 23. The Region observed that in the event that there are discharges during remediation, EPA has the authority to initiate enforcement action. *Id.* The Region also asserted that Carlota would not be an owner or operator of the entire site and therefore

would not be liable for all discharges from the site.[30] *Id.* at 25-26. The Region acknowledged, however, that for purposes of any discharges resulting from remediation, Carlota would be an operator. *Id.* at 26 ("While Carlota would be the operator for purposes of discharges from remediation activities, were they to occur, that does not make them the operator for

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[30] When the Region issued the permit, it answered a question about what the Region would do if, after cleanup, the Gibson Mine continued to discharge copper into Pinto Creek. The Region responded as follows:

> Under the Permit Carlota will also need to submit a plan for the remediation to EPA for approval prior to commencement of activities ([Permit Conditions] I.A.1.a and Part I.A.11.a). Carlota is not obligated to monitor storm water from the Gibson Mine once remediation activities in the permit are completed. Carlota has agreed to inspect the Gibson Mine reclamation area once per year for erosion during the operation of the Carlota mine and notify the owners. Carlota is not obligated to perform maintenance or to perform additional surface water monitoring to support the TMDL in the Gibson Mine tributary. Once Carlota completes the reclamation work as required by the permit, their legal obligation is satisfied. *Areas outside the partial remediation, including discharges, are the responsibility of owners or operators of the Gibson Mine, not Carlota Copper as Carlota Copper is neither the owner or operator of the Gibson Mine.* Once the Gibson Mine partial remediation is complete, the remediated areas should not revert. Exceedances of WQSs from post reclamation discharges are the responsibility of the owners of Gibson Mine.

Response to Comments Second Public Comment Period at 10 (Response #26-5) (emphasis added).

purposes of every discharge from the site"); *see* Oral Argument Transcript at 68.[31] At oral argument, the Region further asserted that there would not be discharges during remediation and explained the procedures Carlota intends to implement to avoid

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[31] Petitioners replied that they "do not quarrel with limiting Carlota's permit coverage to those discharges that involve the facilities undergoing remediation." Reply Brief at 30. At oral argument Petitioners conceded that Carlota would only be responsible for the discharges that relate to the remediation work. Oral Argument Transcript at 44-45 ("Part of the Gibson site is on a different watershed, and [Carlota] would only be responsible for the discharges that they are working on. * * * *If there is a discharge that they are not touching, then they would not have liability even at the outset.*") (emphasis added).

In their supplemental brief, however, Petitioners attempt to back away from these concessions and revive the argument that Carlota *will be responsible for all discharges* at the Gibson Mine site once remediation begins, that is, discharges both from sources that Carlota will remediate, as well as sources that are not covered by Carlota's remediation plan. *See* Petitioners' Response to the Supplemental Briefs at 2-5. Petitioners contend that because Carlota will not remediate all sources of copper loading from the Gibson site, discharges will not stop during or after remediation, and an NPDES permit covering all those discharges is required. Petitioners claim that Carlota needs an NPDES permit for its remediation work at Gibson.

We reject Petitioners' attempt to reargue that Carlota is liable for discharges at the Gibson Mine site unrelated to Carlota's remediation activities. Petitioners significantly narrowed and, in fact, abandoned this argument in their reply brief and at oral argument. Having made these concessions, they may not reassert them in response to our order for additional briefing, which did not address this question. *Cf. In re Lyon County Landfill*, 8 E.A.D. 559, 566 (EAB 1999) (declining to further consider argument abandoned at oral argument).

discharges during remediation. Oral Argument Transcript at 69.

After the oral argument, the Board directed the Region to, among other things, identify evidence in the Administrative Record demonstrating that the Region, at the time it issued the permit, determined that there would not be discharges to Pinto Creek of pollutants from the part of the Gibson site where remediation will take place. *See* Order for Additional Briefing (Jan. 14, 2003). In response, the Region points to several documents in the Administrative Record. *See* Region's Supplemental Brief at 2. First, the Region maintains that it inferred from Carlota's application and subsequent amendments thereto that Carlota did not intend to discharge during remediation. *Id.* Second, based on the description of the procedures Carlota will implement during remediation, as spelled out in the Region's SEA[32] – that is,

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[32] The Region's SEA explains that:

> [T]he proposed reclamation actions include removal of the [pregnant leach solution] and raffinate ponds; excavation, relocation and contouring of the ore materials on the leach pad; covering of the removed ore material; and contouring of the upper watershed to divert storm runoff away from the ore materials in their new location. * * * Carlota Copper proposes to obtain fill and soil for recapping the disposed leach pad material from the proposed disposal site and if required, from a disturbed area of clean fill located immediately east of the raffinate pond. Prior to removal of the ponds, any contained solution or rainwater would be pumped out and disposed of off-site.

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that Carlota will pump out any existing solution and rainwater from the process ponds to be remediated and dispose of this material at an approved off-site facility – the Region concluded that Carlota's remediation activities will not produce discharges. *Id.* at 3. Third, the Region maintains that because Carlota will eliminate two of the major sources of past discharges in the Gibson Mine,[33] because Carlota can perform its remediation in a manner that will provide sufficient containment to prevent any discharge of mine drainage during remediation activities, and because Carlota will not actively mine or generate process waters at Gibson, it does not anticipate remediation discharges.[34] *Id.* at 3-4.

Although the record could be more ample on this point, on balance we find it is adequate to support the Region's conclusion.[35] The Region has cited a number

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> Pond liners and associated piping from the leach pad and ponds also would be disposed of off-site.

Region's SEA at 7-9.

[33] Specifically, Carlota will eliminate the overflow from two abandoned process ponds, that is, the pregnant leach solution ("PLS") and the raffinate ponds.

[34] To support these conclusions the Region cites two documents in the Administrative Record: (1) The Gibson Mine Groundwater, Surface Water, and Discharges into Pinto and Mineral Creeks (Apr. 3, 1999), A.R. XIIIA.1, at 2; and (2) Site Report for Gibson Mine, Gila County, Arizona (Dec. 10, 2000), Supplemental A.R. II.B.6. *See* Region's Supplemental Brief at 3-4.

[35] In responding to Petitioners' second set of comments, it appears as if the Region could have more fully and directly responded to Petitioners' contention that Carlota needed to

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of documents that are part of the Administrative Record of this permitting decision that, in our view, seem to support its determination that Carlota does not intend to discharge and there would not be discharges associated with the remediation activities. Moreover, in technical areas such as the one here, involving the assessment of the nature of remediation work and the potential for discharges resulting from remediation activities, we traditionally defer to the technical expertise of the permit issuer in the absence of compelling or persuasive evidence or argument to the contrary.[36] *E.g., In re Phelps Dodge Corp.*, 10

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obtain a section 402 permit for its work at the Gibson Mine. *See* Comments of Friends of Pinto Creek, et al., Letter from Roger Flynn, Western Mining Action Project, & Kimberly J. Graber, National Wildlife Federation, to Shirin Tolle, U.S. EPA Region 9 at 5 (June 21, 2001). However, since Petitioners did not claim in their Second Petition that the Region erred by failing *to fully respond to their comments* on this point, as required by 40 C.F.R. § 124.17(a)(2), we do not pursue this issue further *sua sponte*.

[36] We have stated on numerous occasions that the Board assigns a heavy burden to petitioners seeking review of issues that are essentially technical. *E.g., In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001); *NE Hub*, 7 E.A.D. at 567. When presented with technical issues, we look to determine whether the record demonstrates that the permit issuer duly considered the issues raised in the comments and whether the approach ultimately adopted by the permit issuer is rational in light of all the information in the record. *See NE Hub*, 7 E.A.D. at 568. If we are satisfied that the permit issuer gave due consideration to comments received and adopted an approach in the final permit decision that is rational and supportable, we typically will defer to the permit issuer's position. *Id.*

E.A.D. 460, 517-18 (EAB 2002); *In re City of Moscow*, 10 E.A.D. 135, 142 (EAB 2001); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999). Such persuasive evidence or argument is not present in this case. As noted previously, the burden of demonstrating that the Region clearly erred rests with the petitioner. This Board has noted on numerous occasions that "mere allegations of error" are not sufficient to support review of a permit condition. *E.g., City of Moscow*, 10 E.A.D. at 172; *In re New England Placing Co.*, 9 E.A.D. 726, 737 (EAB 2001); *In re Hadson Power 14 Buena Vista*, 4 E.A.D. 258, 294 n.54 (EAB 1992). We have further stated that clear error or a reviewable exercise of discretion is not established simply because petitioners present a difference of opinion or alternative theory regarding a technical matter. *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001); *NE Hub*, 7 E.A.D. at 567. Petitioners here have not presented persuasive evidence that Carlota's remediation work will produce discharges. Petitioners' sole contention is that the whole Gibson Mine presently discharges copper into Pinto Creek, and therefore Carlota should be required to apply for a permit as operator. *See* First Petition at 37-38 (contending that the Gibson Mine is a point source and that Carlota would add pollutants because it will be an operator of the site); Second Petition at 15 (contending that EPA must include all known point source discharges in the permit for Carlota's Project including all discharges from the Gibson Mine); Reply

Brief at 30 (arguing that discharges from the Gibson Mine will not stop during remediation); Petitioners' Supplemental Brief at 3 (contending that Carlota will not remediate the whole site). These assertions, without more, do not persuade us that the Region's determination that Carlota will not produce discharges during remediation was clearly erroneous. Also, as noted previously, Petitioners conceded at oral argument that Carlota would only be responsible for discharges that relate to the remediation activities, *see supra* note 31. Therefore, Petitioners' argument that the Gibson Mine as a whole is a point source is irrelevant to the issue at hand. Because we find the Region's conclusion has adequate support in the record, we will not second-guess its decision in the absence of more specific evidence calling its conclusion into question.

Several additional considerations also alleviate any potential concerns about the Region's decision. First, Permit Condition I.A.1 requires the permittee to submit, for the Region's approval, a workplan no later than sixty days prior to beginning any reclamation activities. *See* Permit at 2. As the Region has noted, if discharges are foreseen prior to commencing remediation, Carlota will have to apply for a permit for those discharges. The Permit does not allow discharges from the Gibson Mine reclamation project. Therefore, under section 301 of the CWA, Carlota may not discharge from the remediation site without having such authorization. Moreover, as the Region

stated, if there is a discharge without a permit during the Gibson Mine remediation, EPA has the authority to initiate enforcement action. Region's Response at 23; *see also* Response to Comments First Public Comment Period at 49, 66 (Response DP-8, DP-82e) (stating that if Carlota discharges from points not covered under an NPDES permit the company will be subject to enforcement). Finally, Permit Condition I.A.10, *see* Permit at 7, allows the Region to reopen the Permit to include appropriate conditions or limitations based on newly available information to protect the applicable water quality standards. Thus, the Permit provides safeguards that the Region may use if, contrary to the Region's expectation, discharges associated with the Gibson Mine remediation activities actually occur. We expect the Region will act promptly and appropriately within its discretion to initiate enforcement action or reopen the Permit if discharges associated with remediation occur or become likely.

Because the Region's approach falls within the realm of EPA's discretion, and because the Administrative Record supports the Region's decision not to require a permit for Carlota's hypothetical discharges during remediation activities, we hold that the Region did not abuse its discretion in not requiring

Carlota to obtain an NPDES permit for reclamation activities at the Gibson Mine.[37]

c. *Whether the Region Clearly Erred by Not Including Post-Remediation Monitoring Conditions in Carlota's Permit*

As previously noted, Petitioners claim that the Region erred in issuing this Permit because the Permit does not require monitoring to determine whether the Gibson cleanup is successful and to ensure against the possibility that discharges are reduced in the short-term but revert in the long-term. *See* Reply Brief at 31.

Upon examination of the record, we find that Petitioners failed to preserve this issue for Board review.[38] In their comments during the Second Public Comment Period, Petitioners did not specifically request that this Permit contain further permit conditions such as postremediation monitoring to verify the long-term success of the remediation.

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[37] Furthermore, we decline to review Petitioners' contention that the Region must issue an NPDES permit to the landowners of the Gibson Mine. This permitting proceeding is not the right forum for such request.

[38] As explained more fully in Part III.A.2.a, *infra*, of this decision, one of the factors the Board considers in determining whether an issue has been preserved is whether the issue has been raised during the comment period with sufficient specificity. *In re New England Plating Co.*, 9 E.A.D. 726, 732 (EAB 2001); *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 230-31 (EAB 2000); *In re Maui Elec. Co.*, 8 E.A.D. 1, 9 (EAB 1998).

Petitioners, however, asked the Region for "its position" in the event discharges from the Gibson Mine still occur after remediation, and posed questions about the success of the remediation project. *See* Response to Comments Second Public Comment Period at 10 (Comment #26-5) ("After the Gibson Mine cleanup, the Gibson Mine Tributary (GMT) may continue to discharge copper levels into the Pinto [sic] that exceed water quality standards; if this occurs, what will be EPA's position?"); *id.* at 32 (Comment #26-46) ("Under what circumstances will EPA issue the Permit on the basis of successful completion of the partial reclamation?"); *id.* (Comment #26-47) ("After the Carlota project commences operations, what action will EPA take if the Gibson Mine reverts back to discharges that are similar to pre-cleanup levels?").

These generalized questions and concerns are insufficient to-preserve the more specific challenge that Petitioners now raise on appeal. These comments do not reasonably reveal Petitioners' alleged intention to request that this Permit contain post-remediation monitoring conditions for the Gibson Mine. Simply because Petitioners raised a question or concern about the possibility that the remediated site would turn back to pre-cleanup levels, and requested in their First Petition that a *separate* permit be issued to the owners of the Gibson Mine and/or to Carlota to account for any discharges from the site does not mean that the Region should reasonably have inferred that Petitioners were requesting

inclusion of post-remediation monitoring conditions in *this Permit.* The Region apparently viewed the questions Petitioners raised as inquiries about which party was liable after completion of the cleanup (Carlota or the owners of the Gibson Mine site) and not as a request to incorporate post-remediation monitoring conditions into this Permit. *See supra* note 30; Response to Comments Second Public Comment Period at 10 (Response #26-5) (stating that once remediation is completed Carlota's legal obligation would be satisfied; any exceedances of water quality standards would be the responsibility of the owners of Gibson Mine; and the remediated areas of the site should not revert in any event). As we have stated in other cases, the mere asking of generalized questions, without indicating how the answer to those questions would affect the permit limits, does not provide the requisite specificity the applicable regulations require. *See, e.g., In re Westborough,* 10 E.A.D. 297, 308 (EAB 2002) (finding that petitioner failed to preserve specific objection to copper limit raised in petition because comments, which were posed in the form of general questions, did not indicate how those questions would affect permit limits). Therefore, in our view, Petitioners' comments were not sufficient to preserve the specific request that postremediation monitoring conditions be included in this Permit.

Nonetheless, we note that while the Permit does not contain post-monitoring requirements specific for the corroboration of the offset's success, the Permit contains other provisions to ensure that Carlota's

discharges meet water quality standards by including certain monitoring requirements pertaining to Pinto Creek. For instance, the Permit contains surface water monitoring conditions requiring Carlota to collect and analyze surface water samples within segments of Pinto Creek on a quarterly basis. Permit Condition I.D.1 at 17. Presumably, these data will reveal changes in Pinto Creek's water quality. Thus, if new data reveal degradation of Pinto Creek's water quality after remediation of the Gibson Mine has taken place, the Region may, if appropriate, reopen the Permit to impose more stringent conditions. *See* Permit Condition I.A.10 at 7-8 (Re-opener Clause); *see also* discussion *supra* Part III.A.1.b. Indeed, the Region has expressed its intentions to use this mechanism in such eventuality. *See* Response to Comments First Public Comment Period at 60 (Response DP-53-53) ("The final Permit also requires quarterly monitoring of surface waters and biological organisms to identify any impacts to the watershed that may be attributable to potential discharges allowed under this permit. In the event of any new information obtained during the 5-year permit cycle, which could include results of monitoring data submitted under this permit, which indicates that permit conditions are not sufficient to assure compliance with water quality standards, EPA has the authority to re-open the permit to impose more stringent conditions.").

In addition, the FEIS contains a monitoring plan for the collection of water quality data from Pinto

Creek and its tributaries. FEIS § 3.3.4 at 3-134 (Monitoring and Mitigation Measures). The FEIS monitoring plan contemplates data collection both upstream and downstream from the Project. *See id.* § 3.3.4.1 at 3-136 (water monitoring program includes the following components: "collection and analyses of water quality on quarterly frequency at selected continuous and instantaneous stream flow monitoring stations in *Pinto Creek,* Powers Gulch (when flowing), and Haunted Canyon at sites located *both upstream and downstream from project components*") (emphasis added); *see also* Response to Comments Second Public Comment Period at 10 (Response #26-5). This monitoring program will also provide data that the Region can use to determine the efficacy of the permit conditions. In sum, the Permit and the FEIS provide mechanisms to monitor Pinto Creek's water quality and to reopen the Permit in case new information reveals that the permit conditions are not sufficient to protect Pinto Creek. These considerations in our view mitigate Petitioners' concerns.

In light of all of the above, we deny review of this issue.

2. *Discharges from the Diversion Channels*

In their Second Petition, Petitioners argue that the Permit must regulate discharges from the diversion channels Carlota intends to build in Pinto Creek and Powers Gulch to divert surface and ground water flows from the main Carlota/Cactus pit and the

sulfuric acid leach pad. Second Petition at 3. Petitioners argue that where the diversion channels rejoin the original stream channels are "point sources" under case law that applies that term to the collection or channeling of water into waters of the United States. *Id.* at 5-6. Petitioners allege that the discharges from the diversion channels will contain pollutants from a number of sources: pollutants that were in the stream waters prior to entering the diversion channels, pollutants (in the form of sediment, rock, dirt, and others) that the diverted waters will pick up as they flow over the approximately eight-to-ten feet of alluvial material that Carlota will place in the bottom of the diversion channels, and pollutants Petitioners claim Carlota will add to the stream when it diverts ground water to the surface by constructing a cutoff wall preventing ground water from flowing into the mine pit. *Id.* at 8-10. Petitioners argue that this NPDES Permit must regulate the discharge of these pollutants.

Both the Region and Carlota argue that Petitioners failed to timely raise the issue of whether the Pinto Creek and Powers Gulch diversion channel outlets are "outfalls" from which pollutants will be discharged into waters of the United States and for which Carlota is required to obtain an NPDES permit. Specifically, the Region contends that Petitioners could have reasonably ascertained during the 1998 Public Comment Period the issue of whether the Region had a mandatory duty to regulate the discharges from the diversion channels in this Permit.

The Region and Carlota claim Petitioners not only failed to raise this issue during that public comment period, but also failed to raise it in their First Petition.[39] Region's Response at 8-10; Carlota's Response at 15-17.

In their Reply Brief, Petitioners argue that, "As long as the [Region] was aware of the issue, Board review is proper." Reply Brief at 11. Petitioners also argue that the Region "surely was aware" of the issue of copper and pollutants added to Pinto Creek from the diversion channels "during the permitting process" because "these issues were specifically raised by Petitioners in their comments on EPA's draft TMDL in 2000."[40] *Id.* at 13. In essence, Petitioners contend

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[39] Carlota also argues that it must obtain a permit under CWA § 404 in order to relocate the channels of Pinto Creek and Powers Gulch and that "EPA's regulations make clear that 404 permitted activities do not require a 402 permit" Carlota's Response at 17. Carlota states: "Specifically, 40 C.F.R. § 122.3(b) provides that 'discharges of dredge or fill material into waters of the United States which are regulated under Section 404 of the CWA' do not also require NPDES permits under Section 402 of that act" *Id.* (quoting 40 C.F.R. § 1223(b)). We do not reach this issue as we reject review on other grounds.

[40] In their Reply Brief, Petitioners do not specifically address the question of whether they raised the "outfall" issue during the 1998 Public Comment Period. Instead, Petitioners speak more generally of "additional copper discharges from the diversion channels" along with two other issues that we will discuss in later parts of this decision (whether the Permit must regulate discharges from known mine sites, and whether the Region's SEA failed to review copper loading from the ground water diverted into the diversion channels). *See* Reply Brief at 12-18.

that they may raise on appeal issues that were not brought to the Region's attention until after the close of the First Public Comment Period, and then were raised, not in the record of the permit proceeding, but instead in the Pinto Creek TMDL proceeding. Petitioners' arguments must fail.

Petitioners are mistaken when they suggest that they only need to show that the permit issuer was "aware" of an issue at some time prior to the final permit decision. Instead, as explained below, the applicable requirements dictate that Petitioners must demonstrate that the issue was raised *during* the public comment period. Petitioners also err in suggesting that they only need to demonstrate that the issue was raised before the close of the limited purpose 2001 Public Comment Period (Second Public Comment Period), rather than during the general purpose 1998 Public Comment Period (First Public Comment Period). Instead, as discussed below, the applicable regulations provide that comments submitted during a reopened comment period, like the Second Public Comment Period, are limited to the questions that caused the reopening of the comment period. In this case, the scope of the 2001 Public Comment Period did not encompass issues concerning permit conditions beyond the two withdrawn Permit conditions, which pertain to the Gibson Mine partial reclamation and the permitted discharges from Outfall No. 008. Thus, Petitioners did not preserve for review the issue of discharges from the diversion channels.

Finally, as discussed below, Petitioners incorrectly assert that they can rely upon comments submitted during the Pinto Creek TMDL proceeding to show that they preserved this issue for review. Instead, EPA's decision to issue a final permit must be based upon the record for the permit proceeding established pursuant to 40 C.F.R. part 124, rather than some other proceeding.

a. *Issue Preservation Doctrine and the Requirement That Issues Be Raised "During" Public Comment Period*

Any petition seeking review of a permitting decision under 40 C.F.R. part 124 must, as a threshold matter, first show that petitioners have "standing" to seek review, and, second, demonstrate that the issues petitioners raised in the petition were properly preserved for review. 40 C.F.R. § 124.19(a); *In re Avon Custom Mixing Servs. Inc.*, 10 E.A.D. 700, 704-05 (EAB 2002). Because the Petitioners in this case filed written comments during both the 1998 and 2001 Public Comment Periods, the Petitioners have *standing* to seek review of the Permit's conditions. However, a petitioner with standing may only raise issues that have been *preserved for review.* The regulations and our prior decisions concerning the requirement that an issue be properly preserved for review require us to reject Petitioners' argument that it is sufficient for them to show that the Region was merely "aware" of the issue they seek to challenge.

Several part 124 regulations and Board cases flesh out the issue preservation requirement. First, a petitioner seeking review must demonstrate to the Board that any issues it raises in the petition were raised by *someone during the public comment period.* More specifically, the applicable regulations provide that a petition for review "shall include a statement of the reasons for review, including a demonstration that any issues being raised were raised *during* the public comment period (including any public hearing) to the extent required by these regulations * * * ."[41] 40 C.F.R. § 124.19(a) (emphasis added); *see also In re City of Moscow,* 10 E.A.D. 135, 141 (EAB 2001); *In re Rohm & Haas Co.,* 9 E.A.D. 499, 512-15 (EAB 2000). The regulations further require that persons seeking review of a permit decision "must raise *all reasonably ascertainable issues* and submit *all reasonably available arguments* supporting their position by the close of the comment period." 40 C.F.R. § 124.13 (emphasis added). The Board has consistently construed section 124.13 as requiring that all reasonably ascertainable issues and arguments be raised *during* the public comment period. *E.g., In re City of Phoenix, Ariz. Squaw Peak & Deer Valley Water Treatment Plants,* 9 E.A.D. 515, 524 (EAB 2000), *appeal dismissed per stipulation,* Doc. No. 01-70263 (9th Cir. Mar. 21, 2002); *accord In re Phelps Dodge Corp.,* 10 E.A.D.

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[41] Petitioners need not show this if the issue of concern arises from changes between the draft and final permit. *See* 40 C.F.R. § 124.19.

460, 519-20 (EAB 2002) (dismissing issues because petitioners failed to demonstrate that issues were raised during the public comment period); *In re Kawaihae Cogeneration Project,* 7 E.A.D. 107, 119-20 (EAB 1997). Finally, comments raised during the comment period must be sufficiently specific to allow an informed response. In evaluating whether to review an issue on appeal, this Board frequently has emphasized that the issue to be reviewed must have been raised with specificity during the comment period. *In re New England Plating Co.,* 9 E.A.D. 726, 732 (EAB 2001); *In re Steel Dynamics, Inc.,* 9 E.A.D. 165, 230-31 (EAB 2000); *In re Maui Elec. Co.,* 8 E.A.D. 1, 9 (EAB 1998). On this basis, we often deny review of issues raised on appeal that were not raised with the requisite specificity during the public comment period. *See, e.g., New England Plating,* 9 E.A.D. at 732; *Maui,* 8 E.A.D. at 9-12; *In re Fla. Pulp & Paper Ass'n,* 6 E.A.D. 49, 54-55 (EAB 1995); *In re Pollution Control Indus. of Ind., Inc.,* 4 E.A.D. 162, 166-69 (EAB 1992).

In construing the requirement that comments be raised *during* the public comment period, the Board has denied review of issues presented prior to, but not during, the public comment period. For instance, the Board has held that an issue was not preserved for review when the petitioner's parent company raised the issue *prior* to the public comment period but no comments were submitted on the issue during the public comment period. *Kawaihae Cogeneration,* 7 E.A.D. at 119-20; *accord Avon Custom,* 10 E.A.D. at

707 (no evidence in administrative record that comments were in fact submitted *during* the public comment period). In rejecting issues raised *prior to,* but not during the public comment period, the Board has held that "[t]he phrase 'comment on a draft permit' has a distinct and formal meaning. It refers to comments made *during* a comment period set aside for the permit applicant and other interested persons to comment on a draft permit proposed for issuance by the permit issuer." *City of Phoenix,* 9 E.A.D. at 530. The Board further noted in *City of Phoenix* that:

> The practical effect of Petitioner's position, if it were adopted, would be to require a permit issuer, before finalizing a draft permit, to search through the administrative record for comments submitted by anyone at any time, even on drafts that were never proposed for public comment, starting on the date the permit application was initially filed, and to then determine whether any of the comments called for a revision of the draft permit's terms. In a case such as the one before us, where the administrative record is spread over a number of years, and is comprised of several permit iterations, many of which were never proposed for public comment, the task would necessarily involve a time-consuming and exhausting search of the administrative record, just to assure that all potential comments had been identified. It would further require the permit issuer to divine, by means unknown, whether or not the comments were still being preserved for

> consideration or whether they had been resolved or abandoned by the commenter. The folly of such an enterprise is manifest.

Id. at 527.

Similarly, the Board need not consider issues that are first raised *after* the close of the public comment period. *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 194 n.32 (EAB 2000) ("Permitting authorities are under no obligation to consider comments received after the close of the public comment period."); *In re Am. Ref-Fuel Co.*, 2 E.A.D. 280, 281 n.3 (Adm'r 1986). In the *American Ref-Fuel* case, the Administrator denied consideration of an issue that was first raised after the close of the public comment period on a proposed Clean Air Act permit also governed by 40 C.F.R. part 124. *Am. Ref-Fuel*, 2 E.A.D. at 281 n.3. Likewise, in *Steel Dynamics*, the Board suggested that the permit issuer had no obligation to consider an issue that was raised for the first time two weeks after the close of the public comment period. *Steel Dynamics*, 9 E.A.D. at 194 n.32.

This requirement that we consider only issues raised *during* the public comment period "serves to promote the longstanding policy that most permit issues should be resolved at the [permit issuer's] level." *City of Phoenix*, 9 E.A.D. at 526. By alerting the permit issuer to problems during the public comment period, there is still time for the permit issuer to reverse directions with a minimum expenditure of time and resources, i.e., before the permit

determination becomes final. *Id.* Furthermore, alerting the permit issuer to problems during the public comment period focuses attention on the problems at a time when everyone is on notice that this period represents the last and final stage of problem resolution at the regional level. *Id.*

Simply stated, the effective, efficient, and predictable administration of the permitting process demands that the permit issuer be given the opportunity to address potential problems with draft permits before they become final. *In re Encogen Cogeneration Facility,* 8 E.A.D. 244, 250 (EAB 1999). In this manner, the permit issuer can make timely and appropriate adjustments to the permit determination, or, if no adjustments are made, the permit issuer can explain why none are necessary. *In re Essex County (N.J.) Res. Recovery Facility,* 5 E.A.D. 218, 224 (EAB 1994). Thus, we must reject Petitioners' argument that they need only show that, before the Region made the final permit decision, it was generally "aware" of their argument that the location where the diversion channels rejoin the stream channels are "point sources" or "outfalls" requiring an NPDES permit. As discussed above, the regulations dictate that Petitioners must demonstrate that someone prompted focused consideration of the issue by raising it *during* the public comment period; it is not sufficient for the issue to have been raised *before or after* the public comment period.

In the present case, the Fact Sheet for the Permit, which is dated September 28, 1998, and which

the Region made available to the public during the 1998 Public Comment Period, refers to the proposed diversion of Pinto Creek and Powers Gulch. Fact Sheet at 2. Thus, issues concerning the diversion of Pinto Creek and Powers Gulch (and, in particular, Petitioners' recent characterization of the outlets for the diversion channels as "point sources" or "outfalls" under the CWA) were ascertainable during the 1998 Public Comment Period. Petitioners, however, did not suggest in their comments submitted during the 1998 Public Comment Period that the Region should consider outlets of the diversion channels as "outfalls" or "point sources" within the meaning of the CWA and implementing regulations.[42] *See* Letter from Roger Flynn, Western Mining Action Project, & Kimberly J. Graber, National Wildlife Federation, to Laura L. Gentile, U.S. EPA (Dec. 2, 1998); Comment Letter Supplementing Dec. 2, 1998 Comments (Dec. 30, 1998). Nor have Petitioners pointed to comments of any other commenter raising this issue.[43]

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[42] Petitioners raised comments pertaining to the need to regulate the "construction of the Heap Leach facility in Powers Gulch as a discharge." Letter from Roger Flynn, Western Mining Action Project, & Kimberly J. Graber, National Wildlife Federation, to Laura L. Gentile, U.S. EPA 2 (Dec. 2, 1998). The comments did not refer to the "outfalls" from the diversion channels and the need to regulate such "discharges." We do not find the comments Petitioners raised sufficient to preserve their challenge on appeal.

[43] We also note that, even if the issue had been preserved during the First Public Comment Period, Petitioners failed to raise this issue in their First Petition. As discussed more fully in

(Continued on following page)

b. *Issue Preservation Doctrine and Permit Proceedings with More Than One Public Comment Period*

Petitioners, nonetheless, suggest that, although they did not submit comments regarding the diversion channels before the close of the 1998 Public Comment Period, their comments were submitted before the close of the 2001 Public Comment Period. Specifically, Petitioners argue that they raised the issue of "additional copper and pollutants added to Pinto Creek from the diversion channels" in their comments on the draft TMDL in 2000. Reply Brief at 13. Petitioners also argue that the Region acknowledged in its second response to public comments that Petitioners questioned why the NPDES permit did not cover copper in storm water runoff. *Id.* (citing Response to Comments Second Public Comment Period at 15). These arguments also must fail.

The regulations provide that a second public comment period, such as the 2001 Public Comment Period in this case, does not provide an opportunity to raise any new issues regarding the permit, but instead provides only an opportunity to submit comments on the issues that caused the reopening of the comment period. In particular, the applicable regulations provide that the public comment period may be reopened "[i]f any data information or arguments

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Part III.A.3 below, absent compelling reasons, the raising of an issue in a second petition that should have been raised in an original petition constitutes grounds for dismissal.

submitted during the public comment period * * * appear to raise substantial new questions concerning a permit." 40 C.F.R. § 124.14(b). The Regional Administrator may, among other things, prepare a new draft permit and reopen or extend the comment period under section 124.10 to give interested persons an opportunity to comment on the information or arguments submitted. *Id.* Section 124.14 provides further that "[c]omments filed during the reopened comment period shall be limited to the substantial new questions that caused its reopening. The public notice under § 124.10 shall define the scope of the reopening." *Id.* § 124.14(c).

Notably, the Administrator has rejected, as untimely, comments made for the first time during a second, limited public comment period when the comments did not fall within the limited scope of the second public comment. *In re Brooklyn Navy Yard Res. Recovery Facility,* 3 E.A.D. 867, 869-70 (Adm'r 1992). In that case, the Administrator explained that "the most recent public comment period * * * was limited in scope. * * * [T]his office will review only those issues relating to the changes that prompted the opening of the public comment period * * * or the changes that were made after the public comment period ended." *Id.* The Administrator concluded that the "issues raised by Mr. Bishop were reasonably ascertainable in 1988 when the final permit for Brooklyn Navy Yard was first issued and should have been raised then. Mr. Bishop is precluded from

raising them now [in his petition filed after the second public comment period]." *Id.* at 870.

In essence, this rule, which only allows persons to raise issues within a limited scope during a second public comment period, requires an orderly presentation of issues and arguments at an early point in the process. This promotes predictability and efficiency because the permit issuer can then effectively respond to all comments without unduly delaying the process of reaching a final decision. A rule that would allow issues to be raised belatedly as part of a subsequent comment process would unnecessarily complicate the permit issuance process and interfere with the government's legitimate interest in bringing closure to issues raised and considered during the permitting process.

In the present case, Petitioners raised substantial new questions during the 1998 Public Comment Period, prompting the 2001 Public Comment Period. In particular, Petitioners argued during the 1998 Public Comment Period that, among other things: (1) the Region may not allow any discharges of copper to Pinto Creek because the State of Arizona has identified Pinto Creek as an impaired water body; and (2) the discharges from the wellfield aquifer require an NPDES permit. *See* Letter from Roger Flynn, Western Mining Action Project, & Kimberly J. Graber, National Wildlife Federation, to Laura L. Gentile, U.S. EPA 1, 12 (Dec. 2, 1998). These comments prompted the Region to make two significant changes to the terms of the Permit. First, the comment that

no additional discharges of copper may be made into Pinto Creek prompted the Region to require Carlota to partially remediate the Gibson Mine site, as set forth in Permit Condition I.A.11.a. Response to Comments First Public Comment Period at 59-61 (Responses DP-53-54,-56). In response to the second argument, the Region modified the Permit, after Carlota amended its permit application, to authorize discharges from Outfall No. 008 and to require sampling and monitoring of those discharges, as set forth in Permit Condition I.A.11.b. *Id.* at 31 (Response FE-111j).

Although the Region did not immediately reopen the public comment period to take comments on these two changes to the Permit, the Region did reopen the public comment period for that purpose after Petitioners objected in their First Petition that public comment should have been required for these changes. *See* Notification to Board and Interested Parties of Withdrawal of Permit Conditions and Request for Stay of Petitions, NPDES Appeal Nos. 00-23 & 00-24 (Nov. 7, 2000) (stating that withdrawal was "in order for EPA, Region 9, to provide the public notice and an opportunity to comment on these conditions."). The Region's notice to the public of the opportunity to comment clearly stated that the Region was seeking public comment on the two withdrawn conditions of the Permit Conditions I.A.11.a and I.A.11.b, and on the Region's SEA concerning

those two conditions.[44] The notice did not invite comments on any other part of the Permit. Thus, the Region clearly intended the 2001 Public Comment Period to be a limited comment period within the meaning of 40 C.F.R. § 124.14(b) and, therefore, pursuant to 40 C.F.R. § 124.14(c), the 2001 Public Comment Period was "limited to the substantial new questions that caused" the reopening of the comment period.

As previously noted, in an effort to show that this issue was preserved, Petitioners argue that the Region acknowledged in its Second Response to Comments that Petitioners questioned why this NPDES permit did not cover copper in storm water runoff. Reply Brief at 13. Petitioners' argument must fail. First, the referenced summary of the comment shows that the Region understood the comment to relate to *general* storm water runoff at the Carlota mine site, and not to the particular issue Petitioners raise for the first time in their Second Petition – i.e., discharges from the diversion channels. Second, the Region did not address the merits of Petitioners' comment; rather, the Region explained that the comment was beyond the scope of the Second Public Comment Period. Response to Comments Second Public Comment Period at 15 (Comment #26-14). We agree with the Region that neither the comments

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[44] Notice of Proposed Action, U.S. EPA, Public Notice: AZ-01-W-12 (May 9, 2001), *available at* http://www.epa.gov/Region9/water/npdes/carlotaeanotice0501.pdf.

Petitioners raised during the Second Public Comment Period nor the issue Petitioners raised in their second appeal appear to fall within the limited scope of the 2001 Public Comment Period, for these issues have no relation to either the partial remediation of the Gibson Mine site or discharges from the new Outfall No. 008.

Likewise, we reject Petitioners' argument that by raising the issue of "additional copper and pollutants added to Pinto Creek from the diversion channels" in their comments on the draft TMDL in 2000, they had preserved the issue for Board review. Reply Brief at 13. First, Petitioners' argument does not fall within the scope of the limited 2001 Public Comment Period, and second, even if it did fall within the scope of that comment period, Petitioners did not submit their argument during the public comment period *of the NPDES permitting process.* We thus reject consideration of this comment because it was not submitted in the Administrative Record of this NPDES permitting proceeding during a public comment period, but instead was submitted in the Administrative Record of the Pinto Creek TMDL proceeding. *See In re Avon Custom Mixing Servs., Inc.,* 10 E.A.D. 700, 706 (EAB 2002) ("permit decisions are to be made on the administrative record" and therefore, "at a minimum, 'fil[ing] comments' within the meaning of the standing requirements of 40 C.F.R. § 124.19 contemplates that a Petitioner shall assure that a written objection is registered, either by submitting written comments or by assuring that a written record summarizing any

oral comments conveyed during the public comment period is reflected in the administrative record"); *see also* 40 C.F.R. § 124.18 (requiring the final permit decision to be based upon the Administrative Record defined in that section). To rule otherwise would have the practical effect of requiring a permit issuer to search not only the Administrative Record of the draft permit's public comment period, but also the Administrative Record of any other proceeding pending before the Agency that might have some bearing upon the draft permit and then to determine whether any of the comments found in such other proceedings called for a revision of the draft permit's terms. That would be an unduly onerous, costly, and burdensome process. In contrast, requiring a petitioner to raise issues in the permitting proceeding in which the petitioner wants those issues to be considered places, at most, a minimal burden on the petitioner and provides a manageable record for the permit issuer to review before making the final decision. *In re Kendall New Century Dev.*, PSD Appeal No. 03-01, slip op. at 20-21 (EAB Apr. 29, 2003), 11 E.A.D. ___. To facilitate an orderly review of public comments and allow for a meaningful but efficient permit process, we must reject Petitioners' suggestion that comments submitted during the Pinto Creek TMDL proceeding adequately substitute for comments that commenters should timely submit during the NPDES permit proceeding itself.

Moreover, neither Petitioners' general comment during the Second Public Comment Period concerning

copper in storm water runoff nor the somewhat more specific comment in the Pinto Creek TMDL proceeding concerning additional copper and pollutants added to Pinto Creek through the diversion channels are, by any means, sufficiently specific to have informed the Region that Petitioners were arguing that the point where the diversion channels rejoin the stream channels are "point sources" or "outfalls" within the meaning of the CWA. *See, e.g., In re New England Plating Co.*, 9 E.A.D. 726, 732 (EAB 2001) (explaining specificity requirement); *In re Maui Elec. Co.*, 8 E.A.D. 1, 9-12 (EAB 1998); *In re Fla. Pulp & Paper Ass'n*, 6 E.A.D. 49, 54-55 (EAB 1995); *In re Pollution Control Indus. of Ind., Inc.*, 4 E.A.D. 162, 166-69 (EAB 1992). Therefore, even if these comments had been submitted prior to the close of the 1998 Public Comment Period, they would not have been sufficient to preserve for appeal the question of whether the diversion channels are point sources or outfalls requiring a permit.

For the foregoing reasons, we conclude that Petitioners failed to timely raise their argument that this Permit must contain conditions regulating pollutants in the stream flow at the points where the Pinto Creek and Powers Gulch diversion channels rejoin the original stream channels. To the extent that Petitioners believe that *this Permit* should regulate pollutants in the stream flow where the diversion channels join the original stream channels, Petitioners were required to raise this issue during the 1998 Public Comment Period, which they failed to

do. Thus, Petitioners have failed to satisfy their burden of showing that this issue was preserved for review in this permitting proceeding.

3. *Discharges from Abandoned Mine Sites*

Petitioners further argue in their Second Petition that the Permit should regulate pollutant discharges from inactive mines located on or near Carlota's property, including the Yo Tambien Mine, an inactive mine located upstream Carlota's facility. Second Petition at 11-12. Petitioners allege that EPA has refused to regulate these sites under this NPDES permit, thereby violating section 402 of the CWA. *Id.* at 12.

The Region and Carlota refute Petitioners' arguments on two fronts. The Region and Carlota first point to various procedural deficiencies that could bar Board review. Secondly, the Region and Carlota address the merits of why this Permit did not need to include conditions regulating discharges from Yo Tambien and other inactive mines.

The Region first asserts that Petitioners did not raise this issue during either of the public comment periods, and therefore, they may not raise it in the petitions for review. Region's Response at 8. For its part, Carlota contends that Petitioners' claims are untimely because Petitioners should have made this request in their First Petition, and the withdrawal of the two permit conditions does not excuse Petitioners' late filing. *See* Carlota's Response at 15. The Region

and Carlota continue by further arguing that the Board should deny review of this issue because it is not a challenge to "a condition of the permit" Region's Response at 10; Carlota's Response at 13.

With respect to the merits, the Region argues that the Yo Tambien Mine is not located on land Carlota owns, but instead is located in the Globe Ranger District of the Tonto National Forest, on land the federal government owns. Region's Response at 26. In addition, the Region reasons, Carlota is not mining, supervising, or assuming any day-to-day functions over Yo Tambien; accordingly, Carlota is not responsible for discharges from that site. *Id.* at 27. Carlota also argues that "Petitioners offer no reference to any portion of the record establishing Carlota's ownership of the abandoned mine sites."[45] Carlota's Response at 23.

In their Reply Brief, Petitioners oppose Carlota's argument that they failed to timely raise the issue in

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[45] Seeking to strengthen its position, Carlota filed a motion to strike and/or supplement the record on the ownership and control of the Yo Tambien Mine site issue. Intervenor Carlota Copper Company's Motion to Strike and/or to Supplement the Record (Oct. 2,2002). This prompted Petitioners to file a motion responding to Carlota's motion to strike, as well as a reply from Carlota and a surreply from Petitioners. Petitioner's Response to Carlota's Motion to Strike and/or Supplement the Record (Oct. 11, 2002); Reply to Response to Motion to Strike (Oct. 16, 2002); Petitioner's Surreply to Carlota's Reply to Response to Motion to Strike (Oct. 18, 2002). Given our resolution of this issue, we find it unnecessary to rule on these motions.

their First Petition. Reply Brief at 14. According to Petitioners, this view ignores the fact that Petitioners have challenged the reissued NPDES permit, "a stand-alone permit subject to citizen challenge before the Board." *Id.*

Upon consideration, we reject the Region's argument that Petitioners failed to timely raise in public comments the issue of whether this Permit must contain conditions regulating discharges from inactive mine sites in the vicinity of the proposed Project. Petitioners clearly raised this issue in their comments submitted during the 1998 Public Comment Period.[46] *See* Letter from Roger Flynn, Western Mining Action Project, & Kimberly J. Graber, National Wildlife Federation, to Laura L. Gentile, U.S. EPA

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[46] Indeed, the Region responded to comments regarding the inactive mine sites and whether the Permit should cover those sites. *See* Response to Comments First Public Comment Period at 49, 66 (Responses DP-8, DP-82e). In particular, the Region explained, *inter alia,* as follows:

> EPA did not include additional discharge points because EPA's NPDES permit does not authorize additional discharges. If Carlota discharges from points not covered under an NPDES permit, they will be in violation of the Clean Water Act and will be subject to enforcement actions. * * * Based on information available to EPA, the Carlota Copper Company does not own the Yo Tambien Mine.

Id. at 49 (Response DP-8). The Region stated further that "EPA acknowledges from present information available that Carlota has no discharges to waters of the U.S. currently in violation of the Clean Water Act." *Id.* at 66 (Response DP-82e).

13-15 (Dec. 2,1998). Although we conclude that Petitioners raised this issue during the 1998 Public Comment Period, we nevertheless deny Petitioners' request that we review the Region's decision not to require limits in this Permit for discharges from such sites. As noted by Carlota, Petitioners should have raised this objection in their First Petition, not their Second. Therefore, as we explain more fully below, we reject the issue before the Board as untimely.[47]

The part 124 regulations governing permit appeals only contemplate the filing of one document, that is, the petition for review, and the Board has repeatedly emphasized that a petition must be thorough, detailed, and well-supported. *See, e.g., In re New England Plating Co.,* 9 E.A.D. 726, 737 (EAB

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[47] Because we deny review of this issue as untimely, we find it unnecessary to discuss any other challenges the parties raised in this regard, specifically, whether Petitioners' request constitutes a challenge to "a condition of the permit," and whether Carlota owns, operates, or controls Yo Tambien. Although we deny review of Petitioners' request on procedural grounds, we note that significant consequences nevertheless may flow from the fact that the Yo Tambien site is unpermitted. First, as the Region notes in its response to comments, "[I]f Carlota discharges from points not covered under an NPDES permit, they will be in violation of the Clean Water Act and will be subject to enforcement actions." Response to Comments First Public Comment Period at 49 (Response DP-8). Thus, if Petitioners are correct that Carlota owns or controls the Yo Tambien site, an issue we do not decide, Carlota may be liable for any discharges from the site that violate the CWA. Carlota cannot rely on this Permit as authorizing any discharges from the inactive Yo Tambien Mine site.

2001) (unsubstantiated arguments are not sufficient to warrant review); *In re Zion Energy, L.L.C.*, 9 E.A.D. 701, 707 (EAB 2001) (denying review of facially inadequate petition); *In re Envotech, L.P.*, 6 E.A.D. 260, 267 (EAB 1996) (denying review of petitions for lack of specificity). Section 124.19 provides that a petition for review must be filed within thirty days of permit issuance. 40 C.F.R. § 124.19 ("Within 30 days after a[n] * * * NPDES * * * final permit decision * * * has been issued * * * , any person who filed comments on the draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision."). Generally, the Board strictly construes threshold procedural requirements, like the filing of a thorough, adequate, and timely petition. *Cf. In re Knauf Fiber Glass, GmbH,* 9 E.A.D. 1, 5 (EAB 2000) (denying review of several petitions on timeliness and standing grounds and noting Board's expectations of petitions for review); *In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 121, 127 (EAB 1999) (noting strictness of standard of review and Board's expectation of petitions). To do otherwise would interfere with such principles as judicial economy, that review be exercised only sparingly, and that petitioners demonstrate that the petition warrants review.

To allow petitioners to raise for the first time in a second petition arguments that they should have raised in an original petition effectively permits Petitioners to amend an otherwise inadequate petition. The Board rejects such attempts absent compelling

reasons. *See, e.g., In re Rohm & Haas Co.*, 9 E.A.D. 499, 513 (EAB 2000) ("[Rohm & Haas] has given no cognizable reason for not including this new issue in its original petition, and its attempt to raise it seven months later is untimely in light of the 30-day requirement of § 124.19(a)."). Prior Board cases have generally denied petitioners' efforts to supplement deficient appeals because allowing petitioners to do so typically constitutes an unwarranted expansion of a party's appeal rights and prejudices the permittee's interest in the timely resolution of the permitting process. *E.g., Zion Energy,* 9 E.A.D. at 707 ("to allow petitioners to amend a facially inadequate Petition one month after both the permittee and the permit issuer have filed motions for dismissal and two months after the deadline for filing a petition with the Board, would not only constitute an unwarranted expansion of a party's appeals rights under the applicable regulations, but would result in significant prejudice to the permittee's interest in a timely resolution of the permitting process"); *cf. Rohm & Haas,* 9 E.A.D. at 514 n.23 (denying petitioner's motion for leave to file supplement to petition for review, on the basis that argument was not raised during public comment period with sufficient specificity, and further explaining that even if issue had been raised the Board would still have denied review because the issue had to be raised in the petition for review in order to be considered).

In the instant case, Petitioners have not provided any reasons for not including this argument in their

First Petition, even though Petitioners raised this issue during the 1998 Public Comment Period. Moreover, this particular argument does not relate to either of the two withdrawn permit conditions, in which case the request might have been justified. *See In re Brooklyn Navy Yard Res. Recovery Facility,* 3 E.A.D. 867, 869-70 (Adm'r 1992) (denying review of issues that were reasonably ascertainable when final permit was first issued and should have been raised at that time, and explaining that because the most recent public comment period was limited in scope, review was only available for issues relating to the changes that prompted the reopening of the public comment period).[48]

As already explained, at the Region's request, we stayed the Permit while the Region reopened the public comment period for the limited purpose of seeking comments on two permit conditions. Therefore, contrary to Petitioners' assertions, Petitioners' Second Petition is limited to challenges arising from the Region's decision to reissue these Permit conditions and the limited scope of the 2001 Public Comment Period. Absent a justifiable reason why Petitioners did not raise this argument in their First Petition, or an adequate nexus between this issue and the changes that prompted the 2001 Public Comment

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[48] *See also* discussion *supra* Part III.A.2.b (indicating that issue was not preserved for Board review because, among other things, comments did not fall within the scope of the Second Public Comment Period).

Period, we see no reason to consider this new issue at this later stage of the proceeding.

B. *Regulated Discharges That Petitioners Allege Violate Standards*

Petitioners further argue that the Permit will, or potentially will, violate the CWA and EPA regulations with regard to the discharges it regulates. Petitioners raise two main arguments to support this position. First, Petitioners argue that the Permit violates the CWA and 40 C.F.R. § 122.4(d) because it fails to protect Arizona's water quality standards. Second Petition at 17-25. We address this issue in Part III.B.1 below. Second, citing 40 C.F.R. § 122.4(i), Petitioners claim that the Region cannot approve copper discharges into any segment of Pinto Creek before it implements the TMDL. Second Petition at 16-17. Our analysis of this claim follows in Part III.B.2 below.

1. *Alleged Violations of Arizona's Water Quality Standards*

Petitioners argue that the Permit violates 40 C.F.R. § 122.4(d) because it fails to ensure that discharges from Outfall Nos. 001 through 007 comply with Arizona's antidegradation requirements for copper, and further contend that discharges from Outfall No. 008 will violate Arizona's water quality criterion for temperature. More specifically, with

respect to copper, Petitioners argue that because Pinto Creek is a water quality-limited stream that does not meet the state's water quality criteria for copper, and the TMDL does not ensure compliance with such water quality criteria, the Region may not authorize any new copper discharges. First Petition at 13-15; Second Petition at 15, 17-25. We address these contentions in Part III.B.1.a immediately below. With respect to water temperature, Petitioners argue that discharges from Outfall No. 008 will violate the Arizona water quality prohibition against increasing ambient water temperature by three degrees Celsius. Second Petition at 20. We analyze these arguments in Part III.B.1.b.

a. *Arizona's Antidegradation Policy and Copper Discharges*

As noted above, Petitioners first contend that the Permit violates 40 C.F.R. § 122.4(d) because it does not ensure that discharges from Outfall Nos. 001 through 007 comply with Arizona's antidegradation rule with respect to copper.[49] Petitioners point out that for Tier 1 water quality-limited waters such as Pinto Creek, Arizona law provides as follows: "No

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[49] Section 122.4(d) provides that no permit may be issued "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states." 40 C.F.R. § 122.4(d). As previously noted, antidegradation requirements are "water quality requirements." *See supra* Part II.A.1.

degradation of existing water quality is permitted in a surface water where the existing water quality does not meet the applicable water quality standards." First Petition at 13-14 (quoting Ariz. Admin. Code R18-11-107.B (2002)). According to Petitioners, Arizona regulations prohibit any additional degradation into waters that do not meet water quality standards, and therefore, the Region may not allow any additional discharges of copper into Pinto Creek. *Id.* at 14 n.6. Petitioners further argue that the Gibson Mine partial remediation requirement does not ensure compliance with this antidegradation policy. *Id.* at 15. In their Second Petition, Petitioners elaborate on this argument. They claim that because cleanup of the Gibson Mine will occur upstream of Carlota's discharges, "EPA has not shown that the 'clean-up' of the Gibson Mine will reduce copper levels in Pinto Creek **so that the stream reach subject to Carlota's discharges** will meet standards." Second Petition at 21. Petitioners further contend that the Region cannot ensure compliance with the applicable antidegradation requirements because a number of current or proposed sources of copper loading to Pinto Creek, such as discharges associated with the diversion channels, Yo Tambien, and other mine discharges, remain either unevaluated, unpermitted, and/or unabated.[50] *Id.* at 17, 25.

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[50] Petitioners further contend that even if Carlota successfully completes the Gibson remediation, Carlota's new copper discharges into Pinto Creek will still violate antidegradation

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As discussed more fully below, Petitioners have failed to meet their burden of showing that the Region committed a clear error of fact or law. More specifically, we do not read the Arizona antidegradation policy to contain the limitations advocated by Petitioners; we therefore cannot conclude that the Region violated the Arizona antidegradation policy by allowing new discharges into Pinto Creek. Additionally, Petitioners have not persuaded us that the

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requirements during the initial phases of Carlota's operation. Second Petition at 18. Petitioners explain that this is because "the stream will still likely contain excess copper due to the existing Cactus Breccia formation's contributions of copper into the stream," which will not be eliminated for a number of years. *Id.* Petitioners have not demonstrated, by pointing to evidence in the record, that this argument was raised during the Second Public Comment Period. Likewise, we have not discerned, based on our own examination of the record, that this particular argument was raised during the Second Public Comment Period. Moreover, we find that this argument was reasonably ascertainable at that time. Therefore, we deny review of the Permit on this basis. *See* 40 C.F.R. § 124.19 (petitions for review must include a demonstration that any issues petitioners raise were raised during the public comment period); 40 C.F.R. § 124.13 (obligation to raise all reasonably ascertainable issues and arguments during the public comment period); *accord In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 708 n.16 (EAB 2002) (petitioners bear the burden of demonstrating that arguments on appeal have been either preserved or were not reasonably ascertainable during the comment period); *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 519 (EAB 2002) ("persons seeking review of a permit must *demonstrate* that any issues or arguments raised on appeal were previously raised during the public comment period on the draft permit, or were not reasonably ascertainable at that time") (emphasis added).

Region's offset analysis is clearly erroneous. Our examination of the Region's offset analysis shows that the Region gave due consideration to the available information and made a reasonable and sound determination. A more detailed analysis follows.

As previously explained, *see supra* Part II.A.1, states must adopt antidegradation policies that are consistent with the applicable federal requirements and identify the methods to implement such policies. Arizona has done both. Section R18-11-107 of Arizona's Administrative Code codifies the Arizona antidegradation policy. *See* Ariz. Admin. Code R18-11-107 (2002). Arizona has also developed a guidance document that provides detailed methods for the ADEQ to follow in implementing the state's antidegradation policy. *See* Region's Response Ex. 16 (Arizona's Implementation Guidelines for the State of Arizona Antidegradation Standard) [hereinafter Arizona Guidelines].

Arizona's antidegradation policy sets a three-tiered approach designed to prevent waters within the boundaries of the state from further degrading. *See* Ariz. Admin. Code R18-11-107 (2002); Arizona Guidelines. The parties in this case agree that Pinto Creek falls into Arizona's first tier – Tier 1.[51] Tier 1, the minimum protection for waters within the State

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[51] *See* First Petition at 13; Region's Response at 21 (citing Arizona Guidelines at 14, which set forth trading guidelines for waters qualifying as Tier 1).

of Arizona, consists of the "protection of the *existing uses,* and [the] protection of the water quality necessary to maintain and protect such existing uses." Arizona Guidelines at 13 (emphasis added).

As mentioned earlier, antidegradation policies focus on protecting *existing uses,* while water quality criteria focuses on attaining *designated uses.* Although similar, these concepts differ. Each state sets designated uses based on the use and value of the water body. *See* CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.3(f), .10. Arizona defines a designated use as "a use that is specified in water quality standards as a *goal* for the waterbody segment, *whether or not it is currently being attained.*" Arizona Guidelines at 2 (second emphasis added). Consistent with the federal policy, Arizona defines an existing use as "a use that is actually *attained* in the water body on or after November 28, 1975, *whether or not it is included in the water quality standards.*" *Id.* (second emphasis added); *accord* 40 C.F.R. § 131.3(e). Existing uses represent the absolute floor of water quality in a water body.[52] In a particular case the existing and designated uses may be the same, or, where the designated uses have more stringent water quality requirements than the identified existing uses, one can reasonably presume that the water quality control requirements necessary to protect designated uses will also protect existing

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[52] *See supra* note 9 and accompanying text.

uses. This is because, at a minimum, designated uses must reflect all attainable uses, which includes currently attained and existing uses.[53] In other cases, however, the existing uses might call for a higher level of water quality than the designated uses.[54] In such instances, the state should propose appropriate revisions to the designated uses so that existing uses are properly addressed.[55]

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[53] *See, e.g.,* Arizona Guidelines at 13 ("In such cases [where ADEQ determines that the currently designated uses appropriately reflect the existing waterbody uses], the water quality control requirements necessary to protect designated uses will be presumed to also protect existing uses fully.").

[54] *See, e.g.,* Arizona Guidelines at 14 (establishing procedures for situations where the designated uses do not address existing uses).

[55] The Arizona Guidelines establish the following procedures for this type of situation:

> Where [designated uses do not appropriately address existing uses] a revision to state standards may be needed because, pursuant to the state and federal water quality standards regulations, designated uses are required to reflect, at a minimum, all attainable (including currently attained, or existing) uses. Where existing uses with more stringent protection requirements than currently designated uses are identified, the Department will ensure levels of water quality necessary to protect existing uses fully and, at the earliest opportunity, propose that appropriate revision to the designated uses be adopted into the state water quality standards.

Arizona Guidelines at 14. We also note that CWA § 303 requires states to, from time to time, but at least every three years, hold public hearings to review, modify, and/or adopt new water quality standards. 33 U.S.C. § 1313(c)(1); *see also* 40 C.F.R.

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Because these two concepts focus on the protection of different uses, an activity that impairs one type of use does not necessarily impair the other. In those cases where the existing and designated uses are the same, an activity that impairs designated uses will also impair existing uses. In situations where the designated uses are mainly goals, and thus require for their attainment more stringent water quality requirements than the identified existing uses, a violation of those water quality standards does not necessarily impair the existing uses. With this as background, we now proceed to analyze Petitioners' arguments.

i. *Whether the Arizona Antidegradation Policy Prohibits New Discharges into Tier 1 Water Bodies*

At the outset we observe generally that Petitioners have not pointed to any evidence showing that specific *existing uses* in Pinto Creek are currently impaired, or that by allowing Carlota's discharges Pinto Creek's existing uses would not be maintained. Rather, Petitioners here have presented us with evidence that Pinto Creek does not currently meet water quality criteria for attaining its *designated uses*. Petitioners' arguments presume that because Pinto Creek does not meet the water quality criteria

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§ 131.20 (Procedures for Review and Revision of Water Quality Standards).

for copper necessary to attain its designated uses, Pinto Creek has also reached the point where its existing uses cannot be maintained or protected. Petitioners' arguments assume that existing and designated uses are the same thing.[56] Petitioners, however, have offered no evidence that the designated and existing uses of Pinto Creek are the same, nor have they shown that in order to protect Pinto Creek's existing uses the Region and/or the state must require more protective designations or measures. Accordingly, on this basis alone, Petitioners' failure of proof is fatal.

Moreover, even upon closer examination of Petitioners' specific arguments, their claims fall short. Petitioners point to Pinto Creek's water quality-limited status and to generalized statements in the TMDL about Arizona's antidegradation policy to support their argument that the Region may not allow any additional discharges into Pinto Creek. *See*

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[56] In the First Petition, Petitioners premise their arguments about the alleged violation to the Arizona's antidegradation policy on designated uses, not on existing uses. *See* First Petition at 13-15 ("In accordance with the CWA, [ADEQ] has designated beneficial uses for Pinto Creek – Aquatic and Wildlife (Warmwater), Full Body Contact, Fish Consumption, and Agricultural Irrigation and Livestock Watering – and adopted an antidegradation rule as part of its water quality standards. * * * Because existing copper loadings in Pinto Creek admittedly exceed the state's water quality standard for copper, EPA's allowance of any additional copper discharges from the Carlota Copper Mine will violate Arizona's antidegradation provision.").

First Petition at 14-15; Pinto Creek TMDL at 16. We disagree that the laws and policies applicable here constrain the Region as Petitioners allege.

First, the Pinto Creek TMDL states that it was "established to define goals for the watershed that are necessary to achieve the applicable water quality criteria for dissolved copper in surface waters of Pinto Creek," which are necessary to protect the designated uses. Pinto Creek TMDL at 1. The Pinto Creek TMDL further explains that "[t]he State of Arizona has established numeric water quality criteria to protect the *designated uses* * * * for Pinto Creek."[57] *Id.* The TMDL does not, however, describe any impairment to Pinto Creek's existing uses, nor does it state that the Region cannot protect or maintain Pinto Creek's existing uses if the Region allows new discharges. To the contrary, rather than showing further deterioration, the Pinto Creek TMDL projects that water quality will improve considerably and meet water quality standards when the TMDL is implemented. More specifically, the Pinto Creek TMDL provides

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[57] The Pinto Creek TMDL states that "[t]he Pinto Creek watershed contains areas of known natural copper mineralization that have been exploited by past and present mining activities. These activities have created point and non-point pollution sources that potentially contribute copper to the creek and its tributaries. Natural mineralization also contributes copper loadings to the basin. Pinto Creek has been listed by the State of Arizona under section 303(d) of the Clean Water Act for non-attainment of the water quality standard for dissolved copper." Pinto Creek TMDL at 1.

that "upon implementation of the wasteload and load allocations, Pinto Creek will meet water quality standards and will not experience further degradation," and that "net copper loadings to the Creek are expected to be reduced, consistent with the State's antidegradation requirements." *Id.* at 16.

Secondly, contrary to Petitioners' assertions, Arizona's antidegradation policy does not prohibit new discharges into Tier 1 waters. Arizona Guidelines at 14. Specifically, the Arizona Guidelines provide for upstream pollutant controls for new discharges. As the Region correctly notes, the Arizona Guidelines provide that section R18-11-107 of the Arizona Administrative Code allows trading or offsets. *See* Region's Response at 21. The Arizona antidegradation policy defines trading as "establishing *upstream controls* to compensate for new or increased downstream sources, resulting in *maintained or improved* water quality at all points, at all times, and for all parameters" Arizona Guidelines at 2 (emphasis added). Thus, under Arizona law, new pollutant dischargers may discharge into Tier 1 waters when such discharger offsets its proposed discharge by reducing upstream loadings of that pollutant. With this established, we now turn our attention to Petitioners' claim that Carlota's upstream controls do not ensure compliance with the Arizona's antidegradation policy in Pinto Creek and the stream reach subject to Carlota's discharges.

ii. ***Whether the Gibson Mine Offset Ensures Compliance with Arizona Antidegradation Regulations***

As pointed out above, the Arizona Guidelines allow trading in Tier 1 water bodies. Accordingly, "a proposed activity that will result in a new or expanded source may * * * be allowed where the applicant agrees to implement or finance *upstream controls* for point or nonpoint sources sufficient to *offset the water quality effects of the proposed activity*." Arizona Guidelines at 14 (emphasis added). In the instant case, the Permit requires Carlota, a new source, to implement the Gibson Mine partial remediation as an upstream control of copper sources. Permit Condition I.A.1 at 2. The Permit specifically directs Carlota to "perform reclamation work [that] will result in a reduction in copper loadings into Pinto Creek from *upstream sources equal to or greater than the projected copper loadings* expected through discharges." *Id.* (emphasis added).

The Arizona Guidelines provide further:

> Where such trading occurs, tier 1 requirements will be considered satisfied where the applicant can show that the level of water quality necessary to protect existing uses fully will be achieved. [ADEQ] will document the basis for the trade through a TMDL pursuant to CWA § 303(d) requirements. Such TMDLs will include an appropriate margin of safety. Such a margin of safety will address, in particular, the uncertainties

> associated with any proposed nonpoint source controls, as well as variability in effluent quality for point sources.

Arizona Guidelines at 14 (emphasis added).

In the case at hand, the Region documented the basis for the trade in the Pinto Creek TMDL. *See* Pinto Creek TMDL at 25-36 (Current Loading and Allocation to Sources). The Pinto Creek TMDL, as explained more fully below, contains a margin of safety that accounts for uncertainties in the TMDL analysis. Thus, we now consider whether the Gibson Mine cleanup is sufficient to offset the anticipated water quality effects of Carlota's discharges into Pinto Creek and the stream reach subject to Carlota's discharges.

At the outset, we observe that ADEQ expressly determined in its section 401 certification that the Permit is "protective of the water quality requirements of the State of Arizona." Region's Response Ex. 17 (Letter from Karen L. Smith, Director, Water Quality Division, ADEQ, to Terry Oda, U.S. EPA Region 9 (Feb. 8, 2002)). Petitioners' argument that the Arizona antidegradation regulations require more stringent limitations on the discharge of copper than the limits set forth in the Permit on its face appears to conflict with the findings ADEQ made in its section 401 certification. In addition, the evidence in the record persuades us that the proposed offset sufficiently ensures compliance with Arizona antidegradation

policy, as the Arizona Guidelines interpret Arizona law.

The Region made the determination early in the process that discharges allowed under the permit would not be likely to exceed applicable water quality standards. In its First Response to Comments, the Region explained that it made such determination "based on factors including the expected infrequency of discharges, the high degree of dilution [that] would be associated with any discharges, and the predicted characteristics based on EPA's review of waste rock characterization data." Response to Comments First Public Comment Period at 59-60 (Response DP-53-54). The Region further developed its analysis in the Region's SEA. Region's SEA § 3.1.3. In its Second Response to Comments, the Region explained that "[s]ection 3.1.3 of the Supplemental EA concludes that a significant reduction in copper loading from the Gibson Mine would be expected as a result of the proposed action * * * . The expected reduction in copper loadings at the Gibson Mine would be significantly greater than loadings expected by the potential discharges from the proposed Carlota Copper Project. Additional reductions in copper will be realized by removal from the Cactus Breccia Formation that would be eliminated by project construction. As noted in the earlier Response to Comments, discharges from the Carlota Copper Project are expected to be very infrequent."

Response to Comments Second Public Comment Period at 6 (Response #26-1). Our analysis of the record confirms these determinations.

We note first that for Outfall Nos. 001 through 007 the Permit authorizes only intermittent discharges from storm events, not continuous discharges. *See* Permit Conditions I.A.2.a, .3.a, at 2, 4. For Outfall Nos. 001 to 004 and 006 to 007, the Permit allows Carlota only to discharge waste rock runoff from storm water events that exceed the amount of rainfall resulting from a 10-year, 24-hour storm event (4.20 inches of rainfall, *see* Region's SEA at 27); for Outfall No. 005, the Permit authorizes Carlota to discharge only the volume of runoff that exceeds a 100-year, 24-hour storm event (6.20 inches of rainfall, *see* Region's SEA at 27). *See* Permit Conditions I.A.2.a, .3.a, at 2, 4; Fact Sheet at 4-6. Moreover, the Permit explicitly requires that Carlota construct retention ponds and adhere to other design criteria to achieve these limits.[58] *See Id.*; Fact Sheet at 4-6.

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[58] As explained in Part II.B.2, *supra*, Carlota will build retention ponds to collect stone runoff from the Main and Eder Dumps. The ponds will hold ten times the average annual sediment yield associated with the respective drainage area. The Permit requires the periodic removal of sediments. Permit Condition I.C at 16. Discharges from precipitation events exceeding design criteria will be through a Morning Glory-type outlet (i.e., a screened vertical pipe inside the retention pond) if the depth of storm water within the pond exceeds the top level of the outlet pipe. Permit Condition I.A.2.d at 2-3. Carlota will design the retention ponds so that they have a 95% trap effi-

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Second, the Pinto Creek TMDL's and the Region's SEA's analyses show that the copper loadings into Pinto Creek attributable to the Gibson Mine exceed Carlota's projected loadings and that the partial remediation of the Gibson Mine will offset any discharges from Carlota' s facilities. Petitioners suggest that we disregard these analyses because they are based, Petitioners argue, on a single water quality sample and consist of a "worst-case" copper loading analysis.[59] Second Petition at 22-25. Although Petitioners correctly point out that the Pinto Creek TMDL relies on "worst case" values to estimate load allocations for the Gibson Mine, as explained more fully below, the record shows that the Region used both "best-case" and "worst-case" values in its offset analysis. We also note that Petitioners are not entirely correct when they argue that the Gibson copper loadings are based on a single sample. The data the Region relied upon include six samples of dissolved copper concentration. *See* Region's SEA at 27, App. A

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ciency for the collection of sediments during precipitation events exceeding design capacity by ten percent.

[59] Petitioners also assert that the Gibson loading analysis is based on erroneous assumptions in the Pinto Creek TMDL. Second Petition at 22-25. To the extent that Petitioners seek to challenge the Pinto Creek TMDL's findings and conclusions, this appeal is not the proper forum for those arguments. *See In re City of Moscow,* 10 E.A.D. 135, 161 (EAB 2001) ("[T]o the extent that Moscow's reference to the inaccuracy of the [permit conditions establishing] seasonal constraints on phosphorus represents a challenge to the underlying TMDL, the challenge is not one that this Board would entertain.").

tbl. A-2. Stream flow data, however, were available for only one sample point. *Id.* App. A tbl. A-2. That there were stream flow data available only from one sample point does not invalidate the entirety of the Region's analysis. The Region bases its analysis mainly on concentration data and from this data estimates copper loadings into Pinto Creek at different precipitation levels. While additional stream flow information might have provided additional information to the Region to characterize the nature of copper loadings into Pinto Creek, we find, as explained below, that the Region adopted a rational and supportable approach in light of all the information in the record. This being said, we now turn to the analyses in the Pinto Creek TMDL and Region's SEA.

The data relied upon by the Region in its TMDL and SEA analyses show dissolved copper concentrations from Gibson Mine discharges ranging between 1.82 milligrams per liter ("mg/L") and 236 mg/L. Pinto Creek TMDL at 28; *see also* Region's SEA App. A tbl. A-2. The Pinto Creek TMDL used the highest concentration observed (236 mg/L) – "worst-case" values – to estimate copper loadings and load allocations.[60] The projected loadings for Carlota's proposed

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[60] Loadings and load allocations, which are expressed in mass per time units (i.e, kilograms per day ("kg/day")), are calculated from concentration data (expressed in mass per volume units – i.e., "mg/L") and estimated stream flow (expressed in volume per time units – i.e., cubic feet per second ("cfs")).

Outfall Nos. 001 through 007 are 0.094 kg/day for a 10-year, 24-hour storm event,[61] and 2.01 kg/day for a 100-year, 24-hour storm event. *See* Pinto Creek TMDL App. C tbls. C-5 to -7. According to the TMDL, the Gibson Mine would release approximately 49,652 kg/day of dissolved copper in a 10-year, 24-hour storm event, and 83,138 kg/day in a 100-year, 24-hour storm event. *Id.* tbl. C-3. It is evident from these data – 0.094 kg/day versus 49,652 kg/day and 2.01 kg/day versus 83,138 kg/day – that Gibson Mine copper discharges during worst-case conditions far exceed Carlota's projected copper loadings.[62]

The Region's SEA, for its part, uses the lowest concentration observed (1.82 mg/L) – "best-case" values – in its offset analysis. The Region's SEA compares 1.71 kg/day – the loading from the Gibson Mine corresponding to a concentration of 1.82 mg/L and a stream flow of 0.383 cubic feet per second ("cfs")[63] – with the projected loadings from Carlota's

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[61] The Pinto Creek TMDL projected stream flow data for each target site, *see* Pinto Creek TMDL at 3-4, based on the stream discharges expected from each storm event, *id.* at 3. For instance, for target site TS-2 (i.e., the Pinto Creek reach immediately below the confluence with the Gibson Mine tributary) the projected stream flow for a 10-year, 24-hour storm event is 1,109 cfs. *See id.* at 4, App. C tbl. C-3.

[62] As explained below, Carlota will not remediate the entire Gibson Mine. However, Carlota will remediate what are believed to be Gibson's major sources of copper loadings into Pinto Creek.

[63] Table A-2 indicates that the sample corresponding to a concentration of 1.82 mg/L was taken at a flow of 172 gallons per minute ("gpm") or 0.383 cfs. *See* Region's SEA App. A tbl. A-2.

facility during a 10-year, 24-hour storm event and a 100-year, 24-hour storm event, the only events during which Carlota may discharge. *See* Region's SEA at 27; Pinto Creek TMDL App. C tbls. C-5 to -7. In comparing "best-case" values, the Region's SEA concludes that the lowest observed copper loading from the Gibson Mine (1.71 kg/day) exceeds Carlota's projected loading for a 10-year, 24-hour storm event (0.094 kg/day). For a 100-year, 24-hour storm event, however, the Region's SEA notes that Carlota's copper discharges would be slightly higher than the lowest observed copper discharges from Gibson (2.01 kg/day > 1.71 kg/day). The Region's SEA explains as follows:

> The load of dissolved copper measured above the mouth of the Gibson Mine tributary on March 9, 1995 (1.71 kg/day; see Table A-2) exceeds the load of dissolved copper that is estimated to be released from all proposed Carlota outfalls under conditions of the 10-year[,] 24-hour storm event and it is only slightly less than that which would be released during the 100-year, 24-hour storm event. The magnitude of the storm event preceding the March 9, 1995 measurements has not been quantified. However, ADEQ measured the flow in Pinto Creek at 7 cfs on the day that the Gibson Mine tributary was sampled (ADEQ, 1995). Because this flow is substantially lower than the flow estimated by EPA (2000a) for Pinto Creek above the Gibson Mine tributary under conditions of the 10-year, 24 hour storm (1037 cfs), it is assumed that the March 1995 storm event

> was of comparatively small magnitude. Considering also that the concentration of dissolved copper measured above the mouth of the Gibson Mine tributary on March 9, 1995 is the lowest recorded for 6 samples collected from this reach (see Appendix A, Table A-2), it is likely that the copper load flowing from the Gibson Mine tributary would be substantially higher than 1.71 kg/day under a 10-year, 24-hour storm event. * * * Consequently, the proposed action would be expected to have a significant positive impact on the water quality of Pinto Creek.

Region's SEA at 27.

The SEA's finding that copper discharges from the Gibson Mine (1.71 kg/day) during "best-case" conditions (1.82 mg/L at 0.383 cfs) will be slightly lower than the projected copper discharges from Carlota's outfalls (2.01 kg/day) during a 100-year, 24-hour event does not affect the Region's overall conclusion that the proposed remediation of the Gibson Mine would result in a significant improvement of Pinto Creek's water quality. First, the probability of discharges at 100-year, 24-hour storm events is low; thus, it is likely that these discharges will not occur during Carlota's operation. *See, e.g.*, Fact Sheet at 5 ("Discharges through Outfall 005 from this would only occur from storm events that exceed the volume of runoff from the 100-year, 24-hour event. These greater design criteria were established to prevent potential impacts on flows within Pinto Creek. *Based on these design criteria, it is not likely that discharges*

would occur at [O]utfall 005 during the planned period of operation.") (emphasis added). Second, we are persuaded by the Region's reasoning in its response that it is likely that copper discharges from the Gibson Mine during a 100-year, 24-hour event would be higher than Carlota's projected loadings for the same storm event. Region's Response at 17. In its response, the Region applies the same rationale used in the SEA, Region's SEA at 27, to illustrate this point. *See* Region's Response tbl. 7-1 at 17. Basically, because the lowest observed concentration of dissolved copper from Gibson (1.82 mg/L) was measured at a low stream flow (0.383 cfs), and it is likely that the storm event at which this concentration was measured was of small magnitude in comparison to a precipitation event of 100-year, 24-hour (1,863 cfs),[64] it is likely that copper discharges from the Gibson Mine during a 100-year, 24-hour event would be higher than Carlota's projected loadings. The Region explains that for a 100-year, 24-hour storm event, the copper loading from the Gibson Mine area using the lowest observed concentration would be equivalent to 639 kg/day (1.82 mg/L at 1,863 cfs). *Id.*; *see also* Pinto Creek TMDL at 2-6, App. C tbl. C-3. This amount (639 kg/day) exceeds Carlota's projected copper loading for the same storm event (2.01 kg/day).

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[64] *See* Pinto Creek TMDL tbl. 1-3 at 4 (the projected stream discharge for a 100-year, 24-hour storm event at target site TS-2 is 1,863 cfs).

These analyses show that the Gibson Mine cleanup is sufficient to offset the water quality effects of Carlota's discharges into the Pinto Creek watershed. Likewise, the Pinto Creek TMDL shows that the offset will be sufficient to counterbalance any effects in the stream reach subject to Carlota's discharges. The Pinto Creek TMDL, in explaining its selection of study areas or target sites to establish loading capacities and allocations, specifically states: "The TMDL has been developed to ensure compliance with water quality criteria *at each* of these target sites."[65] Pinto Creek TMDL at 1 (emphasis added). Moreover, as noted in the Pinto Creek TMDL, the development of the Carlota/Cactus pit and the Pinto Creek diversion channel will eliminate the discharges of dissolved copper associated with the Cactus Breccia Formation, *see id.* at 34, 36, which is located in the Carlota reach. Although Petitioners may disagree with the Region's evaluation of the data and the selection of the Gibson Mine to perform remediation work,[66] the Region has nonetheless exercised its considered judgment based on the evidence in the

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[65] The target sites, the TMDL explains, were defined based on, among other considerations, the locations of known and proposed facilities, potential sources of copper loading, and the locations of confluences of major tributaries. Pinto Creek TMDL at 1.

[66] Petitioners also challenge the Region's choice of remediation site under NEPA. We analyze the specifics of this challenge in Part III.C.2.a, *infra*.

record[67] and on a reasonable interpretation of the Arizona antidegradation policy. Having considered and explained the basis for its technical judgment, we find no clear error in the Region's offset analysis.

Third, the record shows that this type of remedial action is feasible and has been a success in the past. The Pinto Creek TMDL, for instance, addresses the feasibility of remediation; it explains that a large proportion of the observed contamination from discrete sources in the Gibson Mine probably comes from the PLS pond and abandoned precipitation launders, which Carlota will completely remove.[68] *See* Pinto

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[67] As previously noted, the Board traditionally assigns a heavy burden to petitioners seeking review of issues that are technical in nature. *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999). When presented with technical issues, we look to determine whether the record demonstrates that the Region duly considered the issues raised in the comments and whether the approach the Region ultimately adopts is rational in light of all the information in the record. *NE Hub*, 7 E.A.D. at 568. If we are satisfied that the Region gave due consideration to comments received and adopted a rational and supportable approach in the final permit decision, we typically defer to the Region's position. *Id.* Petitioners do not establish clear error or reviewable exercise of discretion simply because they present a different opinion or alternative theory regarding a technical matter, particularly when they fail to substantiate the alternative theory. *Town of Ashland*, 9 E.A.D. at 667 (citing *NE Hub*, 7 E.A.D. at 567).

[68] Although the Pinto Creek TMDL indicates that the major copper sources at Gibson include the remnant PLS pond, waste

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Creek TMDL at 35. It also explains that similar remedial actions have reduced copper loadings by more than ninety-nine percent. *Id.*

Finally, Petitioners argue that the Region cannot ensure compliance with the applicable antidegradation requirements because a number of current or proposed sources of copper loading, such as discharges associated with the diversion channels, Yo Tambien, and other mine discharges, remain either unevaluated, unpermitted, and/or unabated. *See* Second Petition at 17, 25. We have already noted that these arguments fail on procedural grounds, *see supra* Parts III.A.2-.3. Moreover, Petitioners' claims ignore that the Pinto Creek TMDL here includes a safety margin to account for uncertainties in the analysis and lack of knowledge, such as potentially unidentified sources and underestimated loadings. *See* Pinto Creek TMDL at 24, App. A tbl. 8-2.[69]

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rock and ore dumps, and abandoned precipitation launders, it also notes that it is probable that a large portion of the observed contamination comes from the sources Carlota proposes to eliminate (i.e., PLS pond and abandoned precipitation launders). *See* Pinto Creek TMDL at 35.

[69] The Pinto Creek TMDL states in pertinent part:

> Clean Water Act Section 303(d) requires to [sic] inclusion of a margin of safety (MOS) to account for uncertainties in the TMDL analysis. The required MOS may be provided explicitly by reserving (not allocating) a portion of available pollutant loading capacity and/or implicitly by making environmentally conservative analytical assumptions in the supporting

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In sum, the analyses in the Pinto Creek TMDL and Region's SEA are adequate to support the Region's technical judgment that the reductions in copper loadings that Carlota would obtain by partially remediating the Gibson Mine are sufficient to offset the water quality effects of the discharges the Permit authorizes. At the very least, the reductions are sufficient to maintain Pinto Creek's existing water quality. Because the Arizona policy defines degradation as "any discharge that *significantly increases* the pollutant concentration or loading of receiving waters," we find that the Region did not clearly err in determining that the Permit's authorization of these limited, intermittent discharges will not significantly increase the copper concentration in Pinto Creek. Arizona Guidelines Exec. Summ. (emphasis added). The information in the record persuades us that the proposed remediation at Gibson

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analysis. The Pinto Creek TMDL provides both an explicit and implicit MOS.

EPA has included an explicit margin of safety equal to 10% of the loading capacity available for allocation for target sites TS-1, TS-2, TS-3 and TS-4; and equal to 20% of the loading capacity available for allocation for target sites TS-5, TS-6, TS-7 TS-8 and TS-9. The higher MOS was selected for the downstream target sites because many of the less well-characterized potential source areas identified by commenters are located in these portions of the watershed. * * * EPA has also provided an implicit margin of safety by making numerous conservative assumptions in the supporting analysis.

Pinto Creek TMDL at 24.

and eventual elimination of the Cactus Breccia Formation will result in large decreases of copper loading in the Pinto Creek watershed and the Carlota reach. We, therefore, decline to second-guess the Region's and ADEQ's technical judgments in this matter.

b. *Temperature Limits*

The Permit allows discharges from Outfall No. 008 into Pinto Creek and Haunted Canyon Creek. The Permit describes these discharges as "Carlota wellfield discharges" or the "Weilfield Mitigation Program." Permit at 1, 8. The Forest Service required these discharges to augment stream flow in Haunted Canyon and Pinto Creek, if needed.

i. *Background and Arguments Before the Board*

During its NEPA analysis, the Forest Service identified a potential reduction in stream base flows in Haunted Canyon and Pinto Creek as an impact that might result from the pumping of wellfield water.[70] Accordingly, the Forest Service and several other agencies agreed on a plan to mitigate these

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[70] As mentioned in Part II.B.2, *supra*, the Project requires a water supply of approximately 590 gpm. To partially satisfy the Project needs, Carlota intends to develop a water wellfield along Haunted Canyon and Pinto Creek. *See* FEIS at 3-107 (Environmental Consequences); Region's SEA at *v*, 9.

impacts (the "Wellfield Mitigation Program").[71] *See* FEIS at 3-134 (Monitoring and Mitigation Measures). This plan requires, among other things, that Carlota augment the stream flow when the stream flow in Haunted Canyon and/or Pinto Creek falls below identified trigger values. FEIS App. E, at E-1. The Wellfield Mitigation Program contemplates the use of wellfield ground water as a potential source of mitigation water. Alternatively, Carlota could use other suitable sources as mitigation water. Region's SEA at *v* ("Stream flow would be augmented with ground water pumped from the wellfield *or* with water from other suitable sources approved by the [Forest Service] and other appropriate agencies.") (emphasis added); *see also* FEIS at 3-138.

Commenters raised concerns during the Second Public Comment Period about using wellfield ground water as a mitigation source. Some commenters stated that the Wellfield Mitigation Program's monitoring requirements were insufficient to ensure compliance with the Arizona water quality criteria governing surface temperature.[72] Specifically, commenters explained that substantive mitigation measures not yet included in the plan would be necessary

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[71] ADEQ and ACOE are two of the other entities that agreed on the mitigation plan. *See* FEIS at 3-137.

[72] *See* Ariz. Admin. Code R18-11-109.0 (2002) ("maximum allowable increase in ambient water temperature, expressed in degrees Celsius, shall not exceed[ ]" three degrees due to thermal discharges).

to prevent temperature impacts because, during certain months of the year, wellfield water temperatures considerably exceed surface water temperatures. *See* Response to Comments Second Public Comment Period at 44-45, 89 (Comments #26-76 to -77, 32-16).

In its response to comments, the Region maintained that both the Wellfield Mitigation Program and the Permit's conditions protect the Arizona water temperature criteria. The Region explained:

> [T]he Wellfield Mitigation Program [requires Carlota] to implement measures, as necessary, to ensure that water discharged to supplement stream flows meet[s] all applicable Arizona water quality standards. These measures will be designed as part of the additional aquifer and wellfield testing that is specified by the mitigation plan. Under Part I.A.11.b of the Final NPDES permit, Carlota may be required to increase the frequency of monitoring, if results exceed applicable Arizona water quality standards. Additionally, the permit may also be reopened to impose additional limits on the discharges based on new information * * * . Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement actions * * * ; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal.

Id. at 19 (Comment #26-20). In the Region's view, the Permit protects the applicable Arizona water temperature criteria because it not only prohibits discharges that exceed the temperature requirement, *see* Permit Condition I.A.9.a, at 7, but it also contains mechanisms to verify compliance, reopen the Permit, and impose additional limits if necessary. *See* Permit Condition I.A.10, at 7-8. The Permit also guards against adverse temperature impacts, the Region reasoned, because it mandates compliance with the Wellfield Mitigation Program, *see* Permit Condition I.A.11.b, at 8, which in turn requires Carlota to implement measures to ensure compliance with all the applicable water quality standards. Accordingly, the Region maintained, Carlota will identify and develop any mitigation measures necessary as part of its compliance with the Wellfield Mitigation Program.

On appeal, Petitioners raise the same concern raised during the Second Public Comment Period. Specifically, Petitioners contend that the Permit "authorizes the discharge of wellfield mitigation water," and, because the "Arizona water quality standards for this stream prohibit a discharge of any water that is +/- 3 degrees Celsius different from the receiving water," discharges from Outfall No. 008 will violate the applicable temperature standard. Second Petition at 20. Petitioners contrast this characterization of the applicable Arizona water quality standard with the terms of Permit Condition I.A.9.a, which states that discharges shall not "[r]aise the natural ambient water temperature of the receiving water

more than three (3) degrees Celsius." Permit at 7. Petitioners also point to data in the Region's SEA that show the average wellfield ground water temperature exceeding the receiving water temperature by more than three degrees during several months of the year. Second Petition at 20. Petitioners argue that this presents a "clear violation" of the Arizona water quality standards. *Id.*

In its response on appeal, the Region reiterates its position during the comment period. *See* Region's Response at 22 (Permit Condition I.A.9.a "expressly prohibits the discharge of water that is in excess of 3 degrees of the receiving water" and the Forest Service requires that Carlota establish a mitigation plan to reduce temperature of discharges if necessary). In other words, the Region relies on the Wellfield Mitigation Program and, thus, on the Forest Service and Carlota to identify if in fact it needs to institute temperature controls for discharges from Outfall No. 008 and to develop such controls.

At the outset, we note that Petitioners base their arguments on several mistaken assumptions. First, Petitioners assume that Carlota will need to make mitigation discharges. The record, however, shows that, at the time the Region issued the Permit, the Region had not determined whether Carlota will need to make mitigation discharges and, even if needed, whether Carlota will need to apply temperature controls. Moreover, the record provides a reasoned justification for this apparent uncertainty.

As already explained, the Forest Service identified a *potential* reduction in stream base flows in Haunted Canyon and Pinto Creek that might result from ground water pumping. *See* FEIS at 3-134 (stating that the Project *could potentially* impact wells and surface water resources) (emphasis added). Accordingly, the first two stages of the Wellfield Mitigation Program, workplans WR-1 and WR-2, are monitoring, reporting, and testing phases designed to, among other things, determine the need to supplement surface flows, *see* Region's SEA at 28, quantify potential effects to stream flow in Haunted Canyon and Pinto Creek, evaluate the most appropriate locations and methods for discharging mitigation flows (i.e., surface discharge, alluvial infiltration, and/or alluvial injection), and evaluate the water quality of the wellfield for use in mitigation stream flows. FEIS at 3-134 to -137. Therefore, until completion of the testing phase, Carlota will not know if it will need to make mitigation discharges. Moreover, the Wellfield Mitigation Program calls for the implementation of water conservation measures to minimize the need for ground water pumping. Implementing water conservation measures would also minimize mitigation discharges. *Id.* at 3-139 (WR-8). Additionally, even if Carlota must make mitigation discharges, Carlota might not need to employ temperature control mechanisms, depending upon the choice of mitigation

water, the location of discharges, and the method of conveyance.[73]

Petitioners erroneously assume that wellfield water constitutes the only available source for mitigation discharges and that because the Permit and the Wellfield Mitigation Program contemplate the use of wellfield water, the Region has granted Carlota permission to violate standards. Petitioners overlook the fact that both the Permit and the Wellfield Mitigation Program prohibit any discharges to Haunted Canyon or Pinto Creek from wellfield mitigation pumping that violates the applicable Arizona water quality standards. Permit Condition I.A.9.a, at 7; FEIS at 3-138 (WR-4), 3-336. In addition, the Wellfield Mitigation Program expressly states in pertinent part:

> If the well water does not meet water quality standards, then the water would need to be treated prior to discharge, or a variance

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[73] Petitioners have not presented any evidence to the contrary. Indeed, at oral argument, when questioned about the Wellfield Mitigation Program and temperature controls for discharges from Outfall No. 008, the Region explained that the need for temperature mitigation could be obviated depending on the method of conveyance and the method of discharge. Oral Argument Transcript at 79-80. Petitioners did not rebut any of these arguments. *Id.* at 125-31. The Region's SEA also suggests that depending on the amount of cooling that occurs during conveyance and the mechanisms of discharge, temperature controls may or may not be needed. *See* Region's SEA at 27-28.

> would need to be granted by the EPA or ADEQ to allow discharge. *Alternatively, Carlota would need to provide another source of supplemental water that met discharge permit requirements for flow augmentation.*

FEIS at 3-138 (WR-4) (emphasis added); *see also id.* (WR-3) ("Ground water pumped from the well field or water from other suitable source(s) approved by the Forest Service and other appropriate agencies would be discharged to the stream to maintain stream flows."). Thus, Carlota's possible use of wellfield ground water is merely an option for mitigation. This flatly contradicts Petitioners' suggestion that the Forest Service and the Region have blindly sanctioned the use of wellfield water.[74]

Finally, Petitioners assume that, because at the time the Region issued the Permit Carlota had not fully developed a mitigation plan, including temperature controls, Carlota would be unable to cool down wellfield discharges. As explained more fully below, in our view, Carlota' s lack of a fully developed

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[74] Petitioners, however, argue that it was not until after the Forest Service issued the FEIS that Carlota's ability to meet the Arizona temperature criteria became an issue, and therefore, Petitioners reason, the FEIS does not ensure compliance with the temperature standard. *See* Reply Brief at 38. We disagree. Although Petitioners may be correct that the FEIS did not specifically discuss compliance with the Arizona temperature criteria, the Wellfield Mitigation Program leaves no uncertainty that mitigation discharges must comply with all applicable Arizona water quality standards, including temperature.

temperature control mechanism at this stage of the Project does not demonstrate that Carlota will not be able to cool down wellfield discharges if it needs to apply temperature controls or that the Region clearly erred in deciding to allow discharges from Outfall No. 008.[75]

Although we find the premises on which Petitioners base their arguments mistaken, we nonetheless need to consider whether, if Carlota must make water mitigation discharges, the Permit conditions assure compliance with the applicable Arizona water quality criteria.

ii. *Whether the Permit Assures Compliance with the Applicable State Water Quality Criteria*

As previously noted, in its response to comments, the Region stated that the Permit here adequately assures compliance with the Arizona water quality standards because it mandates compliance with the Wellfield Mitigation Program, which in turn requires Carlota to implement measures to ensure compliance with all the applicable standards. The Region also asserts that the Permit contains mechanisms to verify compliance.

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[75] Petitioners also raise a similar argument in the context of their NEPA challenges, which we more fully discuss in Part III.C.2.a.iv, *infra*.

The Permit requires that "[a]ll discharges shall be conducted in accordance with the Wellfield Mitigation Program approved by the U.S. Forest Service on July 27, 1997 and any amendments thereto." *See* Permit Condition I.A.11.b.i, at 8. The record further shows that in an effort to more specifically address the temperature issue, the Region, by letter dated March 27, 2001, requested that the Forest Service amend the Wellfield Mitigation Program to include, among other requirements, discharge and ambient in-stream temperature monitoring requirements during periods of testing and mitigation discharges, which will serve as a mechanism to verify compliance. *See* Region's SEA at *vii*, 29. The record before us further shows that the Forest Service agreed by letter dated April 17, 2001, to include those elements in the Wellfield Mitigation Program. The April 17, 2001 letter states that if "temperature mitigation measures are necessary, the Forest Service and Carlota will develop a temperature testing program to determine the effectiveness of the mitigation measure(s)." Region's SEA App. B (Letter from Karl P. Siderits, Forest Supervisor, U.S. Forest Service, to Shirin Tolle, U.S. EPA Region 9 (Apr. 17, 2001)). While the record is not entirely free from ambiguity on this point, we nevertheless interpret this exchange of letters as intending to amend the Wellfield Mitigation Program to incorporate the conditions contained in this exchange of letters as part of the Wellfield Mitigation Program. We therefore adopt this interpretation as a binding interpretation of the Permit. *See In re Great Lakes Chem. Corp.*, 5 E.A.D. 395, 397 (EAB

1994) (construing Region's agreement as a binding interpretation of permit condition); *see also In re Amoco Oil Co.*, 4 E.A.D. 954, 978 n.31 (EAB 1993); *In re Allied-Signal, Inc.*, 4 E.A.D. 748, 765 (EAB 1993).

We note that the Permit itself does not specify monitoring and reporting conditions for temperature, in the event Carlota needs to make mitigation discharges. Although the Permit specifies monitoring and reporting conditions for several other parameters should mitigation discharges take place, it inexplicably does not do so for temperature. *See* Permit Condition I.A.11.b.ii, at 8-9; Permit tbl. I, at 5. While the obligations of the parties would be clearer if the Permit itself contained monitoring and reporting conditions for temperature, we cannot say that the failure to include them here constitutes clear error since such conditions apparently will be part of the Wellfield Mitigation Program, compliance with which is required by the Permit[76] Region's SEA App. B (Letter from Karl P. Siderits, Forest Supervisor, U.S. Forest Service, to Shirin Tolle, U.S. EPA Region 9 (Apr. 17, 2001)).

Two additional related issues bear mention. First, in their Reply Brief, Petitioners argue that there is no evidence that Carlota will be required to

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[76] Moreover, assuming that the Forest Service implements a temperature testing program, the Region would receive any reports that are generated from such program. Permit Condition I.A.11.b.vi, at 9.

meet the temperature limit prior to startup. Reply Brief at 34. In brief, Petitioners express concern that Carlota might violate standards during the testing stage of the Wellfield Mitigation Program. Second, Petitioners argue that the Arizona water quality standards prohibit a *discharge* of any water that is plus-or-minus three degrees Celsius *different* from the receiving water and contrast this characterization of the standard with the terms of Permit Condition I.A.9(a), which states that discharges shall not "[r]aise the *natural ambient water temperature* of the receiving water more than three (3) degrees Celsius." Second Petition at 20 (emphasis added).[77] We consider these issues below.

With regard to Carlota's compliance with the Arizona temperature limitation during the testing phase of the Wellfield Mitigation Program, we *agree* with Petitioners that the record is not entirely clear as to Carlota's obligations during testing. The Permit prohibits discharges if the discharge raises the natural ambient water temperature of the receiving water by more than three degrees Celsius. Permit Condition

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[77] In Carlota's view, Permit Condition I.A.9.a "does not allow raising the ambient temperature of the receiving water by more than 3 degrees; it does not prohibit discharges that are more than 3 degrees higher than the receiving waters." Carlota's Response at 31 n.37. According to Carlota, the receiving water temperature is what matters. Petitioners, on the other hand, contend that the Arizona criteria for temperature focuses on the discharge itself rather than on the receiving water. Reply Brief at 34 n.14; Oral Argument Transcript at 8.

I.A.9.a, at 7. On its face, this provision would appear to apply to *any* discharges. The Permit's mandate that discharges comply with the Wellfield Mitigation Program is nonetheless somewhat confusing in this regard. The FEIS indicates that "any water discharged to the stream through the mitigation flow program (WR-3) would be required to meet the Arizona surface water quality standards." *See* FEIS at 3-138. By explicitly referencing WR-3, the mitigation flow program, but not WR-2, the testing phase, the FEIS creates potential confusion as to whether Carlota must comply with the Arizona water quality standards during the testing phase – WR-2.

Carlota made clear at oral argument that it does not intend to discharge any waters during the testing period unless those waters meet the temperature standard. Oral Argument Transcript at 111. According to Carlota, "the quantities of water would not be that large and they would be retained on-site until they met the temperature standard and before discharge." *Id.* Since the parties do not appear to dispute that the temperature limit should apply during testing, we adopt this interpretation as an authoritative and binding reading of the Permit. We note, however, that it might be prudent for the Region to make minor changes in the wording of the Permit to make clear that Permit Condition I.A.9.a does indeed

apply to any discharges whether during WR-2 or WR-3.[78]

Lastly, with respect to Petitioners' characterizations about Permit Condition I.A.9.a, we reject their view that the applicable Arizona water quality criterion for temperature prohibits "*discharge* of any water that is +/- 3 degrees Celsius *different* from the receiving water." Second Petition at 20 (emphasis added). Contrary to Petitioners' suggestion,[79] the Arizona regulations do not speak to the characteristics of the discharge, standing alone. Instead, Arizona's regulations address the effect that the discharge has on the receiving water. Specifically, the Arizona regulations prohibit discharges that *cause an increase in the ambient stream temperature* by more than three degrees Celsius.[80]

The Permit condition here closely follows the applicable Arizona regulations.[81] However, in the present case, Carlota has not applied for a mixing zone for thermal discharges. *See* Region's SEA at 28.

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[78] "We suggest that the Region clarify this point at least in part because language in the April 17, 2001 letter implies that there are going to be discharges into Haunted Canyon, Pinto Creek, and Powers Gulch during the test phase. *See* Region's SEA at 29.

[79] *See supra* note 77 and accompanying text.

[80] *See supra* note 72.

[81] *See* Permit Condition I.A.9.a, at 7 (discharges shall not "[r]aise the natural ambient water temperature of the receiving water more than three (3) degrees Celsius").

Therefore, there is little difference between the practical effect of Petitioners' characterization and the actual regulatory text because any discharge exceeding the surface water temperature standard will likely raise ambient receiving water temperature above the limit at the point of discharge,[82] if even just briefly.[83] *Id.*

In sum, we find that the Permit ensures compliance with the applicable Arizona water quality criteria and thus deny review on this basis.

2. *Section 122.4(i): Requirements for New Dischargers*

Petitioners further attempt to advance their challenge that Carlota's discharges will violate the CWA and EPA regulations by contending that EPA cannot allow new copper discharges into any segment

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[82] The Region's SEA states that "Carlota has not applied for a mixing zone under the Arizona surface water quality standards at [Ariz. Admin. Code] R18-11-114. Consequently, the surface water quality standards for temperature apply at the point of discharge to Haunted Canyon or Pinto Creek." Region's SEA at 28.

[83] Although the language in Permit Condition I.A.9.a closely follows the applicable standard, it does not explicitly reflect the proviso stated in the Region's SEA that, in this case, surface water quality standards for temperature apply at the point of discharge. As noted in the Region's SEA, *supra note* 82, absent a mixing zone, the standards apply at the point of discharge. In light of the potential for confusion, however, *see supra* note 77, we suggest that the Region clarify this point.

of Pinto Creek prior to the implementation of the Pinto Creek TMDL and restoration of the water body. Second Petition at 15-17, 26. Petitioners cite 40 C.F.R. § 122.4(i) and the Arizona antidegradation policy to support this proposition. Our analysis below focuses mainly on section 122.4(i) as support for Petitioners' contentions. The previous section covered most of our analysis of the Arizona antidegradation policy.[84] We begin our analysis by recounting the arguments the parties advanced in this case and identifying the issues for Board review, and then close examining such issues.

a. *Issues and Arguments Before the Board*

During this appeal Petitioners have filed several briefs, all of which discuss the reach of section 122.4(i) and its implications for this case. This provision provides:

> No permit may be issued:
>
> * * *
>
> To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality

[84] *See supra* Part III.B.1.a.

> standards or is not expected to meet those standards even after the application of the effluent limitations required by sections 301(b)(1)(A) and 301(b)(1)(B) of CWA, and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that:
>
> > (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and
> >
> > (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.

40 C.F.R. § 122.4(i).

The theories Petitioners advance about section 122.4(i)'s scope, as well as the challenges Petitioners raise based on their interpretation of its requirements, appear to differ in each brief. Because it is important for the analysis that follows to understand the nuances and changes in the parties' positions, we review them in some detail before turning to our analysis of the claims.

Petitioners cited section 122.4(i) in their First Petition mainly for the proposition that new sources may obtain NPDES permits allowing discharges into impaired water bodies only where a TMDL analysis has first been performed and the impaired water body

was being remediated.[85] *See* First Petition at 16. Petitioners claimed that "EPA cannot issue a final NPDES permit to Carlota until after the TMDL process is complete and Pinto Creek *is being remediated*." *Id.* (emphasis added). Petitioners further argued that, even if a TMDL has been completed, dischargers proposing to discharge have the burden of demonstrating, before the close of the NPDES comment period, compliance with all the requirements in section 122.4(i). *Id.* at 17. That is, Petitioners explained, "the proposed discharger has the dual burden of demonstrating *before the close of the comment period* that sufficient [pollutant load[86]] allocations remain to allow for its discharge and that existing dischargers *are subject to schedules which will result* in remediation of the water to meet water quality standards." *Id.* (second emphasis added). In explaining their view of the interplay between the NPDES and TMDL programs, Petitioners stated:

> Where the State has established a final TMDL, it may issue an NPDES permit so long as the applicant can show that the TMDL provides room for the additional discharge and establishes compliance schedules *for current permit holders* to meet the water quality standards. 40 C.F.R. § 122.4(i). Otherwise, no NPDES permits may be issued

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[85] Recall that at the time Petitioners filed their First Petition, no TMDL for Pinto Creek had been issued.

[86] *See supra* notes 13-14 for an explanation of pollutant load allocations.

> which allow new or additional discharges into the impaired water body. *Id.*

First Petition at 11 (emphasis added).

As explained in Part II.B.3 of this decision, after the filing of the First Petition the Region withdrew two of the Permit conditions and requested the Board to stay the remaining Permit conditions. We granted the Region's request. Thereafter, the Region reopened the public comment period so that the public could comment on the withdrawn conditions. Before the Second Public Comment Period the Region approved a final TMDL for Pinto Creek, which included WLAs[87] for the proposed Carlota facilities and the BHP Pinto Valley Mine (currently the only permitted discharger into the water body in question) and LAs[88] for all other sources. *See* Pinto Creek TMDL at 32-34.

Dissatisfied with the Region's issuance of the final Permit, Petitioners filed their Second Petition, in which they stress once again the importance of TMDL implementation. Petitioners, however, appear to modify their theory. While in their First Petition Petitioners seemed to argue that, in order to allow new copper discharges into Pinto Creek, the water body needs to be on its way to remediation, in their Second Petition, Petitioners seem to argue that full implementation of the Pinto Creek TMDL and thus

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[87] *See supra* note 13 (defining WLAs).

[88] *See supra* note 14 (defining LAs).

restoration of the water body is first required.[89] Petitioners articulate their revised claim as follows: "Thus, prior to implementation of [the TMDL], Pinto Creek *will not meet stream standards and no discharge can be authorized.*" Second Petition at 26 (emphasis added). Petitioners further argue that the Permit fails to comply with section 122.4(i) because "no compliance schedule has been established for bringing Pinto Creek into compliance with Arizona water quality standards." *See id.* at 17. According to Petitioners, "no new permit allowing a copper discharge can be issued on Pinto Creek until waste load and load allocations *have been* determined and **implemented through compliance schedules** *for all* loadings into Pinto Creek."[90] *Id.* (first and second emphasis added).

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[89] *Compare* First Petition at 16 ("EPA cannot issue a final NPDES permit to Carlota until after the TMDL process is complete and Pinto Creek *is being remediated*") (emphasis added) *with* Second Petition at 26 ("The EPA argues that since it has published the TMDL, it can authorize Carlota's discharge. However, the fact of TMDL publication is of little value. The pollutant loading reductions noted in the TMDL must be **implemented**. * * * Thus, prior to implementation of these point and nonpoint source load reductions, Pinto Creek will not meet stream standards and no discharge can be authorized.").

[90] We note that it is unclear if Petitioners mean by "implemented through compliance schedules" that the dischargers are on compliance schedules or have completed the requirements of such schedules. However, because Petitioners assert that Pinto Creek will not meet stream standards until the Pinto Creek TMDL is implemented, we assume the latter.

In addition, in their Second Petition Petitioners appear to have abandoned their argument that proposed dischargers must demonstrate *before the close of the public comment period* that sufficient allocations remain. *Id.* at 17. Accordingly, the Second Petition signals that the Region's issuing of the final Pinto Creek TMDL satisfies the concerns Petitioners expressed in their First Petition that the Region must first complete a TMDL prior to issuing Carlota's permit and that the TMDL allows sufficient allocations for the discharge.

The Region, for its part, argues that Petitioners premise their arguments on an improper interpretation of section 122.4(i). In the Region's view, section 122.4(i) "does not prohibit all discharges to impaired water bodies, just those that would 'cause or contribute' to the violation." Region's Response at 13. Although the Region's response focuses on the first sentence of section 122.4(i) – that no permit may be issued to a new source or a new discharger if the discharge from its construction or operation will cause or contribute to the violation of water quality standards – the Region also argues that the Permit here satisfies the requirements in the second sentence of section 122.4(i) because: (1) sufficient pollutant load allocations remain to allow for Carlota's discharges; and (2) the Pinto Creek TMDL includes waste load allocations for the BHP Pinto Valley Mine, the only existing NPDES-permitted discharger into Pinto Creek. *Id.* at 18-19.

In their reply brief Petitioners elaborate on the theory advanced in the Second Petition. Petitioners assert that not only must *current permit holders* be subject to compliance schedules, as Petitioners had stated in their First Petition, but that all dischargers (i.e., point and non-point source dischargers) must also have a compliance schedule in place, irrespective of whether such dischargers currently hold a permit authorizing the discharge. *See* Reply Brief at 33. Referring to the specific requirement in section 122.4(i)(2), Petitioners contend: "Overall, § 122.4(i)'s requirement applies to 'existing discharges.' EPA cannot unilaterally change the regulations by inserting the word 'permitted' between 'existing' and 'discharges.'" *Id.*

Then, in their response to the supplemental briefs the Region and Carlota filed in response to our January 14, 2003 Order, Petitioners maintain that the key issue here is not whether section "122.4(i)(2) requires only existing permitted dischargers to achieve load reductions via 'compliance schedules.' Petitioners' Response to the Supplemental Briefs at 15. The critical issue, Petitioners continue, is not whether the Region and Carlota failed to show that all existing dischargers, including permitted and unpermitted dischargers, are subject to compliance schedules to bring Pinto Creek into compliance with water quality standards, but whether there will be sufficient capacity in Pinto Creek to handle the new copper loadings. *Id.* Petitioners also took this opportunity to explain the apparent discrepancies between

their First Petition and their Reply Brief. In doing so, they assert:

> [In our First Petition, we] focused on the underlying requirement – that there is assimilative capacity to handle the new loadings. As noted herein, it is not critical whether the existing point sources are reduced via "compliance schedules" or via the equally applicable requirement that there be enough capacity to handle the new discharges via reduction in unpermitted point and non-point sources.

Id. at 14 n.5.

Although Petitioners' legal theories about the meaning of section 122.4(i) have continued to evolve, the main point Petitioners have emphasized from their Second Petition forward is that the Region cannot authorize new discharges into an impaired water body unless a TMDL analysis has been performed, implemented, and the water body restored.[91]

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[91] *See* Second Petition at 26 (stating that no discharges can be authorized prior to implementation); Oral Argument Transcript at 22 ("What you have to do is bring all the discharges down, all the current loading, Gibson, the Yo Tambien mine, the other sources, get it down below the copper standard, then you can start adding new copper in, because you are not violating the anti-degradation provisions in the Clean Water Act"); Oral Argument Transcript at 3 ("Our reading of 122.4 says, no, you're not causing or contributing when the stream is basically healthy again. Then you can add some copper. Of course, not copper enough to get you over that limit again, but enough where you would still be under the copper standard."); Petitioners' Re-

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Accordingly, we now consider whether the Region clearly erred by allowing discharges from Carlota, a new source, before the restoration of Pinto Creek to water quality standards for copper and whether the Region satisfied the requirements in section 122.4(i).[92]

b. *Whether New Discharges Into An Impaired Water Body Can Only Be Allowed After Restoration of the Water Body*

In Petitioners' view, the Region must return Pinto Creek to good health, that is, return it to compliance with Arizona water quality standards for copper, before the Region allows new sources, like Carlota, to discharge into the water body.[93] Petitioners

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sponse to the Supplemental Briefs at 11-13 (arguing that Gibson offset will not cause Pinto Creek to achieve standards because the stream will still exceed the standard for copper, and that completion of the Pinto Creek TMDL is only the first step).

[92] In a recent decision, issued after the filing of Petitioners' appeals with the Board, the Court of Appeals for the Ninth Circuit upheld a district court order that prohibited the State of Montana from issuing any new discharge permits until Montana developed its TMDLs. *Friends of the Wild Swan v. EPA*, Nos. 00-36001, 00-36004, 00-36013, 2003 WL 21751849 (9th Cir. July 25, 2003). Because the Region here has now issued a TMDL for Pinto Creek, Petitioners' argument that new sources may only discharge into an impaired water if a TMDL has first been developed, *see* Petitioners' Response to the Supplemental Briefs at 10, is now moot, and in any event, the Region's action of issuing the Permit after the TMDL was adopted does not contravene *Swan*. *See* discussion Part III.B.2.b, *infra*.

[93] *See supra* note 91.

claim in essence that the CWA and its implementing regulations forbid new discharges into impaired water bodies. In other words, the only opportunity for a new source[94] or new discharger[95] to discharge into an impaired water is when the water body is no longer impaired. Simply put, Petitioners propound a categorical ban on new sources and new dischargers into impaired water bodies.

Petitioners support their contentions by citing the general goals of the CWA – i.e., to protect and restore the water quality necessary to protect the integrity of United States waters – as well as some Board cases emphasizing that the Region must set permit limits to meet water quality standards. *See* Petitioners' Response to the Supplemental Briefs at 9. Petitioners, however, have not cited to any specific statutory provision, nor have they identified any case law that more precisely addresses the specific issue at

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[94] The term "new source" is defined in Part II.A.I, *supra*. *See* CWA § 306(a)(2), 33 U.S.C. § 1316(a)(2); *see also* 40 C.F.R. § 122.2.

[95] The regulations define the term "new discharger" as "any building, structure, facility, or installation:"

> (a) From which there is or maybe a "discharge of pollutants;"
>
> (b) That did not commence the "discharge of pollutants" at a particular "site" prior to August 13, 1979;
>
> (c) Which is not a "new source;" and
>
> (d) Which has never received a finally effective NDPES permit for discharges at that "site."

40 C.F.R. § 122.2.

hand. Rather, Petitioners only cite, as noted previously, the Arizona antidegradation policy and 40 C.F.R. section 122.4(i) as support. *See id.* at 8-12.

We disagree with Petitioners' interpretation of the CWA and its regulations. Neither the CWA nor the regulations Petitioners cite limit discharges into impaired waters in the particular way Petitioners suggest. Moreover, as explained more fully below, we find that by allowing Carlota's discharges the Region effectuated a policy choice sanctioned by the CWA and Supreme Court precedent. We, therefore, do not regard the Region's determinations as clearly erroneous.

The United States Supreme Court decision, *Arkansas v. Oklahoma,* 503 U.S. 91 (1992),[96] guides our analysis. The Court in *Arkansas* held that the CWA does not establish a categorical ban on discharges to impaired water bodies. 503 U.S. at 107. The Court thus reversed the Tenth Circuit Court of Appeals' holding that the CWA "prohibit[s] any discharge of effluent that would reach waters already in violation of existing water quality standards." *Id.* In rejecting the Tenth Circuit holding the Supreme Court stated:

> Although the Act contains several provisions directing compliance with state water quality standards, *see, e.g.,* § 1311(b)(1)(C), the

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[96] Petitioners argue that this case is of little relevance here. As explained more fully below, *see infra* note 103, we disagree.

> parties have pointed to nothing that mandates a complete ban on discharges into a waterway that is in violation of those standards. The statute does, however contain provisions designed to remedy existing water quality violations and to allocate the burden of reducing undesirable discharges between existing sources and new sources. *See, e.g.*, § 1313(d). Thus, rather than establishing the categorical ban announced by the Court of Appeals – which might frustrate the construction of new plants that would improve existing conditions – the Clean Water Act vests in the EPA and the States broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution. *See, e.g.*, § 1288(b)(2).

Id. at 108. Similar to the parties in *Arkansas*, Petitioners in the instant case have also failed to point to language in the CWA establishing a categorical ban on new sources or new dischargers proposing to discharge into impaired water bodies.

The Supreme Court in *Arkansas* cautioned against interpreting the CWA in a way that would frustrate beneficial development and with it opportunities to improve existing conditions. The Court explained that rather than frustrating development, the CWA has vested EPA and the states with the authority to develop "long-range, area-wide" programs aimed at alleviating and eliminating existing

pollution. The TMDL program is one such "long-range, area-wide" program.[97] In brief, the state or EPA first identifies water quality-limited segments, and then it develops TMDLs. After the adoption of the TMDL, the implementation process follows and requires the participation and collaboration of numerous players. Thus, implementing the controls and reductions identified in TMDLs occurs through "existing [s]tate, Territorial and authorized Tribal programs, other Federal agencies policies and procedures, as well as voluntary and incentive-based programs." Revisions to the Water Quality Planning and Management Regulation and Revisions to the NPDES Program in Support of Revisions to the Water Quality Planning and Management Regulation, 65 Fed. Reg. 43,586, 43,588 (July 13, 2000) ("Final TMDL Rules").[98] Moreover, the NPDES permitting program, which regulates point sources, contains several regulations aimed at implementing TMDL findings. *See, e.g.*, 40

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[97] As noted in the background section of this decision, Part II.A.1, CWA § 303(d) sets forth EPA and the states' duties and responsibilities under the TMDL program. *See* CWA § 303(d), 33 U.S.C. § 1313(d); *see also supra* note 12.

[98] *See also Sierra Club v Meiburg*, 296 F.3d 1021, 1026 (11th Cir. 2002) ("Once established, TMDLs are implemented through various mechanisms, some of which are provided in the Act, with responsibilities for implementation divided between EPA and the states. Point source discharges are regulated through the federal permit regime, with TMDLs incorporated into the effluent and technological-based limitations. * * * The Act generally leaves regulation of nonpoint source discharges through the implementation of TMDLs to the states.").

C.F.R. § 122.44(d)(1)(vii)(B) (providing that effluent limits developed to protect water quality criteria be consistent with the assumptions and requirements of any available wasteload allocation); *id.* § 122.4(i) (establishing requirements for new sources and special conditions where a TMDL has been developed).

The fact that the NPDES permit regulations provide these tools to ensure implementation of established TMDLs does not, without more, translate into the requirement Petitioners propose – i.e., that full restoration of the impaired water body is necessary prior to allowing new discharges into such waters. As a result of the Pinto Creek TMDL, a "long-range, area-wide" program, illustrative of the kind of program discussed by the United States Supreme Court in *Arkansas,* is already in place for the water body in question here. In sum, neither the statute nor the Supreme Court in interpreting the Act contemplate that full implementation of these programs must first occur before allowing new discharges into impaired water bodies.

We now proceed to examine the regulatory text. As noted above, Petitioners here specifically maintain that section 122.4(i) supports their position[99] According to

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[99] Petitioners also cite to the Arizona antidegradation policy for the proposition that new sources or new dischargers must not discharge into an impaired waterway unless restoration of the water body occurs first. In their response to the Region's supplemental brief, Petitioners stress once again their position

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Petitioners, "[t]he conclusion that a TMDL must be implemented prior to the issuance of an NPDES permit is confirmed" by the requirements in 40 C.F.R. section 122.4(i) that sufficient pollutant load allocations remain and that the existing dischargers into the segment are subject to compliance schedules designed to bring the segment into compliance. Second Petition at 16-17. Petitioners thus view these requirements as lending support for their contention that in Carlota's case, a new source discharger, implementation and total restoration must occur first.

We disagree. Section 122.4 of 40 C.F.R. establishes several prohibitions on issuing NPDES permits. In particular, section 122.4(i) prohibits the issuance of an NPDES permit to a new source or new discharger "if the discharge from its construction or operation will cause or contribute to a violation of water quality standards." 40 C.F.R. § 122.4(i). This section further states that a new source or new discharger proposing to discharge into an impaired water segment may obtain a permit if it demonstrates that "there are

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that the Arizona antidegradation policy does not allow any additional degradation in waters that do not meet established water quality standards. Petitioners' Response to the Supplemental Briefs at 9-10. As we explained in Part III.B.1.a, *supra*, we do not read the Arizona antidegradation policy as a prohibition against new sources or new dischargers. Contrary to Petitioners' assertions, the Arizona antidegradation policy explicitly allows new pollutant discharges where the applicant provides an offset by reducing upstream loadings "sufficient to offset the water quality effects of the proposed activity." *See* Arizona Guidelines at 14.

sufficient remaining pollutant load allocations to allow for the discharge" and "the existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards." *Id.* § 122.4(i)(1)-(2).

We do not read section 122.4(i) as establishing a complete ban on new discharges into an impaired waterway, as Petitioners suggest. To the contrary, we read this section as allowing new discharges into impaired water bodies so long as the proposed discharges do not cause or contribute to a violation of water quality standards and the requirements in section 122.4(i)(1) and (2) are met.

This approach is consistent with prior Agency pronouncements pertaining to this specific section:

> A new source or new discharger may, however, obtain a permit for discharge into a water segment which does not meet applicable water quality standards by submitting information demonstrating that there is sufficient loading capacity remaining in waste load allocations (WLAs) for the stream segment to accommodate the new discharge and that existing dischargers to that segment are subject to compliance schedules designed to bring the segment into compliance with the applicable water quality standards.

Amendments to Streamline the NPDES Program Regulations: Round Two, 65 Fed. Reg. 30,886, 30,888 (May 15, 2000). These statements confirm our

position that, rather than completely banning new source discharges, section 122.4(i) provides new sources with the opportunity to obtain a permit if the requirements specified in that section are met.

Significantly, in a recent United States district court case, *Friends of the Wild Swan v. EPA*, 130 F. Supp. 2d 1207 (D. Mont. 2000), *aff'd in part, rev'd in part & remanded by* Nos. 00-36001, 00-36004, 00-36013, 2003 WL 21751849 (9th Cir. July 25, 2003), the court did not rule that TMDLs need to be fully implemented before states or EPA can allow any new discharges into an impaired water body. The court did, however, prohibit the State of Montana and the EPA from issuing new permits for discharges into impaired waters for which TMDLs were not developed.[100] In upholding the district court decision, the Ninth Circuit drew a distinction between imposing a complete ban and restricting the issuance of permits, stating: "The district court's order, however, does not impose a complete ban but only restricts the issuance of new permits or increased discharges for water quality limited segments which are already in violation of state water quality standards." *Friends of the Wild Swan v. EPA*, Nos. 00-36001, 00-36004, 00-36013, 2003 WL 21751849 (9th Cir. July 25, 2003). The Ninth Circuit thus found that requiring the development of TMDLs only restricts the issuance of

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[100] The case before us is distinguishable in that, here, a TMDL is already in place.

permits for new discharges into impaired waters, suggesting that had the lower court order imposed a complete ban, the Ninth Circuit might have overturned such a decision. What Petitioners suggest here is not a mere restriction on the issuance of new permits for discharging into impaired waters but a complete ban. We therefore find the Ninth Circuit holding compatible with our ruling.

In sum, there is nothing in the statute, the cases Petitioners cite, or section 122.4(i), providing that an impaired water segment needs first to be restored prior to allowing new discharges into the water body. Furthermore, we cannot endorse Petitioners' interpretation because to do so would perpetrate the very outcome the Supreme Court in *Arkansas* sought to avoid – adoption of a rigid approach that might frustrate the construction of new facilities that would *improve existing conditions. See Arkansas v. Oklahoma,* 503 U.S. 91 (1992). The Region here has opted for a reasoned and more flexible approach, which, in the long run, should improve water quality in Pinto Creek and eliminate excess copper loadings. Petitioners nonetheless ask the Region and this Board to halt this project because the cleanup will not have occurred in its entirety before Carlota begins discharging. It strikes us that to agree with Petitioners would set in motion a "Catch 22" whereby the stream cannot get cleaner because it cannot become pristine enough for Carlota to begin the work. Thus, this outcome appears to run afoul of the goals of the Clean Water

Act and, in any event, is not compelled by the statute, CWA section 303(d), nor the regulations.

With this as background we now turn to a closer examination of whether the Region met the specific requirements of 40 C.F.R. § 122.4(i) in this case.[101]

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[101] For purposes of this decision, in reviewing whether the Region satisfied the requirements in section 122.4(i), based on the arguments before us and the Region's representations, we assume, without deciding, that the first and second sentences in section 122.4(i) both apply to the instant case. This is noteworthy because the parties here have expressed different views regarding how to read this provision.

For instance, in Petitioners' view, the provisions in section 122.4(i) must be read together, and the requirements in clauses (1) and (2) should not be read independently from the first sentence. *See* Petitioners' Response to the Supplemental Briefs at 13-14. The Region, on the other hand, construes section 122.4(i) differently. The Region notes that 122.4(i) is amenable to different interpretations and could be construed so that the first sentence has independent significance from the second. Region's Supplemental Brief at 5. Under this approach, the Region suggests, section 122.4(i) could be read so that clauses (1) and (2) would not apply to a situation like the present case – where an offset has been provided that would result in a substantial net reduction in the pollutant loadings delivered to an impaired water. *Id.* The Region adopted this approach when it initially issued this Permit. However, because the Region believes it has now satisfied all the requirements in section 122.4(i), it has asked us to assume, for purpose of this decision, that clauses (1) and (2) apply here. *Id.*

Because the parties here agree that, at least in this case, both sentences apply, it is unnecessary to consider whether the Region is correct that in some circumstances one need not reach the issues presented by the second sentence. We thus leave for another day our judgment on this matter, for a case in which the

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c. *Whether the Region Satisfied the Requirements in Section 122.4(i)*

With regard to the first sentence in section 122.4(i) – that no permit may be issued to a new source or a new discharger if the discharge will cause or contribute to a violation of water quality standards – Petitioners argue that any offset occurring prior to the new discharges must be of such magnitude that the stream will achieve standards even after the new loadings. Petitioners' Response to the Supplemental Briefs at 16. Petitioners contend that the Gibson Mine offset will not cause Pinto Creek to achieve compliance. *Id.* at 12. Basically, in Petitioners' view, in order to not "cause or contribute" to a violation of water quality standards, the water body must first be in compliance with such standards.

The Region reads the "cause or contribute" standard differently. In the Region's view, Carlota will not cause or contribute to the violation of water quality standards but rather will improve existing conditions because the reductions that will result from its activities are greater than the projected discharges. According to the Region, Carlota's permit would result in a net reduction in the total load of

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parties squarely present the issue. Nonetheless, we note that the Ninth Court decision in *Friends of the Wild Swan v. EPA*, Nos. 00-36001, 00-36004, 00-36013, 2003 WL 21751849 (9th Cir. July 25, 2003), decided after briefing was complete in this case, could influence the outcome of this controversy in cases in the Ninth Circuit.

copper delivered to Pinto Creek and that suffices to meet the first sentence of section 122.4(i). Region's Response at 12; Region's Supplemental Brief at 5.

The Region's interpretation of section 122.4(i) is consistent with prior Agency interpretation of that section. First, the Region points to the preamble of the Final TMDL Rules of July 2000, in which the Agency stated that under section 122.4(i) a permitting authority may determine that permit limits must reflect an overall reduction in pollutant loading to the water body in order to ensure that the new discharge does not cause or contribute to a violation of water quality standards. Final TMDL Rules, 65 Fed. Reg. 43,586, 43,641 (July 13, 2000).[102]

Second, the Region points to a response memorandum filed on behalf of EPA in *Sierra Club & Louisiana Environmental Action Network v. Clifford, see* Region's Response at 14, as additional evidence that its interpretation of section 122.4(i) squares with prior Agency pronouncements. In *Sierra Club,* the Agency asserted that, in practice, EPA has considered

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[102] We note that although EPA withdrew the Final TMDL Rules of July 2000, *see* 68 Fed. Reg. 13,608 (Mar. 19, 2003), the Region's reliance on EPA's position stated in the Final TMDL Rules is nonetheless appropriate. The Agency adopted a similar position in its 2003 Water Quality Trading Policy. *See* U.S. EPA Final Water Quality Policy (Jan. 13, 2003), *available at* http://www.epa.gov/owow/watershed/trading/finalpolicy2003.html (stating that EPA supports implementation of water quality trading).

a discharge that has been offset in accordance with permit requirements not to "cause or contribute to a violation of water quality standards." Region's Response Ex. 14 at 53.

The threshold question here is how to interpret the regulation. A well-accepted rule of statutory interpretation provides that regulations must be interpreted to harmonize with and further, not conflict with, the objective of the statute they implement. *In re Bill-Dry Corp.*, 9 E.A.B. 575, 595 (EAB 2001) (citations omitted).

As previously noted, we reject Petitioners' reading of the regulations, which stands for a complete prohibition against new discharges into impaired waters. If the Agency had intended the term "cause or contribute" as used in section 122.4(i) to mean that the water body must first be in compliance, it would have made that clear and said just that. We find Petitioners' interpretation at odds not only with the statute and its purpose but also with Arizona antidegradation policy and the text of the regulation itself As discussed more fully *infra,* this is especially true in light of the fact that the second sentence in section 122.4(i) expressly allows discharges into impaired water bodies so long as there are sufficient pollutant load allocations and existing dischargers are on a compliance schedule.

The Region, for its part, has adopted a flexible approach that more closely mirrors the objectives of the CWA, as recognized by the Supreme Court in

Arkansas v. Oklahoma, 503 U.S. 91 (1992),[103] in that it promotes the improvement of existing conditions and reduction of water pollution. *See* Region's Response at 13-15. Under the circumstances here, where the applicable statute and the state policy that Petitioners invoke – the Arizona antidegradation policy – do not establish an absolute ban on new source dischargers, the better reading of the regulation supports the approach the Region adopted. In our view, the interpretation the Region advocates more reasonably effectuates the purposes of the CWA

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[103] With regard to the *Arkansas* decision, Petitioners claim that the decision simply stands for the proposition that a new source discharger is allowed to discharge new loadings into an impaired water segment if the new loadings are so low as to be undetectable. Petitioners' Response to the Supplemental Briefs at 11 n.3. Petitioners state that the Court in *Arkansas* affirmed EPA's position that the Oklahoma standards, which require that there be "no degradation" of the stream – a similar standard to the Arizona antidegradation policy applicable here – would only be violated if the discharge effected an "actually detectable or measurable change in water quality." *Id.* Petitioners argue that unlike the *Arkansas* case, the copper loadings here will be detectable and measurable, thereby triggering the Arizona antidegradation prohibition. *Id.*

For the reasons set forth in Part III.B.1.a, *supra,* we disagree with Petitioners. Although the Oklahoma antidegradation policy seems to contain language similar to the applicable antidegradation policy here, the Arizona Guidelines define the specific showings a proponent of new discharges must make to satisfy the Arizona antidegradation policy, and the permit applicant here has satisfied such requirements. *See supra* Part III.B.1.a. In any event, Petitioners have not shown that Carlota's discharges will *in fact* effect an adverse detectable or measurable change in water quality.

and the regulatory text in question. Moreover, to rule otherwise would undermine the Agency's overall efforts to implement the Clean Water Act. Accordingly, we reject Petitioners' interpretation of section 122.4(i), which could unduly impede the Agency's efforts to improve water quality.

Having clarified this legal issue, we next determine whether the Region's factual determination that Carlota's discharges will not cause or contribute to a violation of water quality standards was clearly erroneous. The determination of whether or not a discharge will not cause or contribute to a violation of water quality standards is technical in nature. As noted in previous parts of this decision, the Board traditionally assigns a heavy burden to petitioners seeking review of issues that are essentially technical in nature, and we typically defer to the Region's expertise, provided that the approach the Region adopts is rational and supported by the record.[104] We find, upon examination of the record, that the Region's determination that Carlota's discharges will not cause or contribute to the violation of water quality standards is adequately supported.

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[104] *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999).

In its First Response to Comments the Region explained its rationale for allowing Carlota's discharges. The Region stated its reasons as follows:

> EPA agrees that EPA is prohibited by 40 C.F.R. [§] 122.4(i) from issuing a permit to a new source or new discharger into a water segment that does not meet applicable waters [sic] quality standards if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. Accordingly, based on facility design, and also included as a permit requirement, Carlota is only allowed to discharge runoff into Pinto Creek from waste rock dumps through retention ponds during major storm events. In addition, the final permit requires Carlota to partially remediate Gibson Mine, a significant source of copper currently being discharged into Pinto Creek, which will result in a net reduction of copper to Pinto Creek. * * * Due to the expected infrequency of discharges, the high degree of dilution which would be associated with any discharges, the predicted characteristics of discharges based on EPA's review of waste rock characterization data and the provision of the permit which requires Carlota to partially remediate Gibson Mine, EPA maintains that the final permit ensures compliance with Arizona's antidegradation policy by preventing further degradation of Pinto Creek.

Response to Comments First Comment Period at 60 (Response DP-53-53). Thus, according to the Region, because Carlota is only allowed to discharge runoff into Pinto Creek from waste rock dumps through retention ponds during major storm events, *see* Fact Sheet at 2-4; the proposed discharges are infrequent, *see id.* at 2, 4-6; there is a high degree of dilution associated with any discharges, *see id.*; and the partial remediation of the Gibson Mine would result in a net reduction of copper loading into Pinto Creek, *see* Pinto Creek TMDL at 35, Carlota will not be further degrading Pinto Creek or causing or contributing to a water quality violation.

In short, based on the factors enumerated above, the Region considered the question and concluded that Carlota's discharges will not "cause or contribute" to a violation of water quality standards. We find these considerations rational and fully supported by the record. As our analysis in Part III.B.1.a.ii of this decision shows, the Gibson Mine remediation will result in significant reductions of copper loading into Pinto Creek. This, in our view, evidences that, rather than "causing or contributing" a degradation, Carlota will be improving Pinto Creek's water quality, or at the very least maintaining water quality. We, therefore, do not find clear error in the Region's determination.

With regard to the requirements in the second sentence of section 122.4(i) – that there are sufficient remaining pollutant load allocations to allow for the discharge and that the existing dischargers are

subject to compliance schedules – Petitioners claim that the Region has failed to show that there are sufficient remaining pollutant load allocations to allow Carlota's discharges. Petitioners' Response to the Supplemental Briefs at 14. According to Petitioners, the key issue here is whether there is sufficient capacity in Pinto Creek to handle the new copper loadings. *Id.* at 15. More specifically, Petitioners characterize the issue as follows:

> The dispute over whether § (i)(2) requires only existing permitted dischargers to achieve load reductions via "compliance schedules" is not the key issue. The critical issue is whether the Region has met the requirement of the CWA, as partially implemented by § 122.4(i) – *that there will be sufficient capacity in Pinto Creek to handle the new copper loadings.* In other words, whether Yo Tambien and other identified copper sources fall under § i(1) (non-permitted sources) or § i(2) (for permitted point sources as the Region maintains) is not the key – *the key is to reduce these loadings "so that the sum of that pollutant in the water body is reduced to the level specified by the TMDL.*

Id. (quoting *Sierra Club v. Meiburg,* 296 F.3d 1021, 1026 (11th Cir. 2002) (emphasis added)).

Petitioners' new characterization of the issues has two dimensions. On the surface, Petitioners express concern that Carlota has not met the specific requirement that there be remaining pollutant load

allocations to allow the new discharges. *Id.* at 14 ("even if the Region's view of §(i)(2) was accepted, it still does not obviate the clear fact that there is not 'sufficient remaining pollutant load allocations to allow for the discharge'). At bottom, however, Petitioners question the Region's plans for implementing the Pinto Creek TMDL. *Id.* at 15 ("the key is to reduce these loadings 'so that the sum of that pollutant in the water body is reduced to the level specified by the TMDL'"); *id.* at 17 n.8 ("While the new Carlota discharge was included in the TMDL calculations, any attempt to rely on this inclusion for purposes of demonstrating 'sufficient remaining pollutant load allocations' for the new discharge is completely undermined by the Region's position that it has no intention of ever implementing the load allocations for Yo Tambien and other copper sources recognized in the TMDL because the Region now says that it is 'infeasible' to conduct any such remediation.").[105]

Given that the Pinto Creek TMDL specifically provides pollutant load allocations for Carlota, *see* Pinto Creek TMDL at 24, and to the best of our knowledge the adequacy of the TMDL has not been challenged in the proper forum, this Board has no reason to disregard the Pinto Creek TMDL findings. In our view, that the Pinto Creek TMDL assigns

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[105] These arguments directly relate to the implementation of the Pinto Creek TMDL; as such, this is not the right forum for this line of challenge. *See In re City of Moscow,* 10 E.A.D. 135, 161 (EAB 2001).

waste load allocations to Carlota's outfalls provides strong evidence that "there are sufficient remaining pollutant load allocations to allow for the discharge."

Although Petitioners refocused their challenge under section 122.4(i) to emphasize the requirements in 122.4(i)(1) (pertaining to loading capacity), in their response to the Region's Supplemental Brief Petitioners nonetheless contend that the Region's reading of section 122.4(i)(2) (pertaining to existing dischargers) does not ensure compliance with water quality standards.[106] Petitioners' Response to the Supplemental Briefs at 19: This is so, Petitioners reason, because the Region has failed to demonstrate that BHP, the only "permitted" source discharging into Pinto Creek, has a permit designed to bring the segment into compliance. According to Petitioners, even if BHP fully complies with its permit, Pinto Creek will still

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[106] In its supplemental brief, the Region states that Petitioners failed to raise the specific issue of the Permit's compliance with section 122.4(i)(2) during the First and Second Public Comment Periods, and thus, Petitioners failed to preserve the issue for Board review. Region's Supplemental Brief at 11-13. We disagree.

Under the particular circumstances of this case where: (1) no TMDL existed at the time of the First Comment Period; (2) the Pinto Creek TMDL was issued after Petitioners filed their First Petition, thereby potentially triggering the requirements in section 122.4(i)(1)-(2); and (3) the Region limited the scope of the Second Comment Period to the two withdrawn conditions – to rule otherwise would be unfair, for it would have the effect of depriving Petitioners of a venue to raise these concerns.

not be in compliance with water quality standards. *Id.*

The flaw in Petitioners' argument, once again, stems from their assumption that new sources may only discharge into fully restored water bodies, an interpretation we have rejected. Moreover, this argument also entails a challenge to the Pinto Creek TMDL implementation plan, a challenge that they cannot bring in this forum.[107]

We further decide that we do not find the Region's interpretation of section 122.4(i)(2) – that this subsection applies only to existing permitted dischargers – erroneous. The subsection provides: "The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards." 40 C.F.R. § 122.4.

The requirement in section 122.4(i)(2) can only apply to point sources because under the CWA the Agency only has authority to promulgate regulations for point sources, *see Natural Res. Def. Council v. EPA*, 915 F.2d 1314, 1316 (9th Cir. 1991), and as previously noted, the regulation of nonpoint source discharges is left to the states, *see Sierra Club v. Meiburg*, 296 F.3d 1021, 1026 (11th Cir. 2002). In addition, by its use of the term "compliance schedules," the Agency has signaled its intention that the

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[107] *See supra* note 105.

requirement be applicable to existing "permit holders."[108]

Petitioners admitted as much in their First Petition, *see* First Petition at 11, a view Petitioners sought to modify later on, *see* Reply Brief at 33. We understand Petitioners' concern that unpermitted sources otherwise might appear to fall out of the scope of section 122.4(i)(2). However, the Region argues that in light of the CWA section 301 prohibition against point source discharges without a permit, it is unnecessary to broadly construe section 122.4(i)(2). We agree with the Region. *See Natural Res. Def. Council, Inc. v. Costle,* 568 F.2d 1369, 1377 (D.C. Cir. 1977) (Agency's discretion to either issue permit or subject parties to proscription in CWA § 301). As we noted previously in this decision, *see supra* Part III.A.1.a, EPA does not have a mandatory duty to track each unpermitted source and require its owner or operator to apply for a permit. *See Heckler v. Cheney,* 470 U.S. 821, 831 (1985) (recognizing that an agency cannot act against each technical violation of the statute it is charged with enforcing); *see also Bravos v. EPA,* 334 F.3d 1166 (10th Cir. 2003) (stating that EPA does not have a mandatory duty to issue permits). The Region does, however, possess the authority to do so, and could, in its discretion, exercise such authority. In addition, the Region also has

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[108] The regulations define the term "schedules of compliance" as a "schedule of remedial measures included in *a permit* * * * *" 40 C.F.R. § 122.2 (emphasis added).

the authority to enforce the requirements of the CWA by bringing enforcement actions against those who discharge without a permit. *See* CWA § 309, 33 U.S.C. § 1319.

For all the foregoing reasons, we deny review of the issues Petitioners raise under the rubric of section 122.4(i).

C. *Alleged NEPA Violations*

As noted in Part II.A.1 of this decision, the issuance of an NPDES permit to a new source is subject to the environmental review provisions of NEPA. When it issued the July 2000 permit decision, the Region adopted the FEIS and the ACOE's SEA as its NEPA review. The public had an opportunity to comment on the Region's NEPA determination as well as on the Region's determination to issue the Permit.

In their First Petition, Petitioners claimed that the Region violated NEPA because it failed to consider the environmental impacts associated with activities the Permit authorized. *See* First Petition at 46-48. Petitioners argued that the Region should not have relied solely on the FEIS and the ACOE's SEA to fulfill its NEPA obligations because those documents did not consider the environmental impacts related to Permit Conditions I.A.11.a and .b, that is, the Gibson Mine cleanup and the permitted discharges from Outfall No. 008. *See id.* at 48-50.

As explained in Part II.B.3 of this decision, after the filing of the First Petition, the Region withdrew these two permit conditions and reopened the public comment period to allow the public to submit comments on the withdrawn conditions and on a draft supplemental environmental assessment (the Region's SEA). The Region's SEA evaluated the environmental impact of two courses of action: (1) the proposed agency action,[109] that is, the issuance of the Permit absent the two withdrawn permit conditions; and (2) the issuance of the Permit supplemented by the two withdrawn Permit conditions, which were included to eliminate any adverse effects that may otherwise result from Carlota's Permit. Based on the findings in the SEA, the Region determined that it did not need to prepare an EIS; instead, having found that the Permit will not have a significant impact on the environment, the Region issued a FONSI document.[110] *See* Amended ROD/FONSI at 2 (Feb. 27, 2002).

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[109] *See* 40 C.F.R. § 6.601 ("the term administrative action for the sake of this subpart means the issuance by EPA of an NPDES permit to discharge as a new source").

[110] We note as background that not all federal agency actions require the development of an EIS. The agency proposing the action must develop an EIS only when the proposing agency determines that the action is a *major federal action significantly* affecting the quality of the human environment. *See* NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C). Thus, typically the proposing agency begins its environmental review by examining "any related environmental information document to determine whether any significant impacts are anticipated and whether

(Continued on following page)

In their Second Petition, Petitioners again object to the Region's reliance on the FEIS and the ACOE's SEA and also challenge the content of the Region's SEA. With regard to the Region's reliance on the FEIS and ACOE's SEA, Petitioners assert that by "tiering"[111] its NEPA review "to the FEIS' macro review, EPA has abdicated its duty to ensure that all discharges receive full NEPA review and are covered by an NPDES permit and comply with the CWA." Second Petition at 27. With regard to the Region's SEA, Petitioners claim that: (1) the SEA fails to meet NEPA's standards because it does not consider a reasonable range of alternatives;[112] (2) the SEA "fails

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any changes can be made in the proposed action to eliminate significant adverse impacts." 40 C.F.R. § 6.105(c) (emphasis added). In analyzing the environmental consequences of a proposed action, a proposing agency may first develop an environmental assessment document ("EA"). *See* 40 C.F.R. § 6.105 (Synopsis of Environmental Review Procedures). An EA succinctly evaluates whether the proposed action may have significant impacts and, hence, requires an EIS, or whether instead a FONSI is appropriate. *See* 40 C.F.R. §§ 6.105(d), 1508.9. A FONSI is appropriate, the regulations state, "[w]hen the environmental review indicates no significant impacts are anticipated *or when the project is altered to eliminate any significant adverse impacts.*" *Id.* § 6.106(5) (emphasis added).

[111] *See* discussion *infra* Part III.C.1.a.

[112] Second Petition at 28-31. Petitioners raise three arguments in support of this specific challenge. Petitioners claim that: (1) the "purpose and need" for the proposed action is unreasonably narrow; (2) the alternatives analysis is biased; and (3) the Region failed to consider a reasonable range of feasible alternatives to the proposed action. We analyze these arguments in Part III.C.1-.2 below.

to take the requisite 'hard look' at the direct, indirect, and cumulative environmental impacts of the proposed action with respect to how several reaches of Pinto Creek, Powers Gulch, Haunted Canyon, and other affected waters, will (or will not) be affected by the discharges associated with Carlota's operations;"[113] and (3) the decision reached in the SEA appears to have been predetermined as an attempt to "cover" missing aspects of the original analysis.[114] Petitioners request a remand for a "revised draft EA."[115] *Id.*

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[113] *See* Second Petition at 27, 35-39. With regard to this challenge, Petitioners contend that: (1) the Region failed to adequately describe the impacts from ground water diverted into the Pinto Creek diversion channel; (2) the Region failed to adequately review the mitigation plan for wellfield discharges at Outfall No. 008; and (3) the Region failed to obtain adequate baseline information and accurate scientific analysis. We analyze these arguments in Part III.C.2 below.

[114] Second Petition at 28, 34-35.

[115] Although the regulations do not prescribe the content of EAs as extensively or prescriptively as the content of EISs, *compare* 40 C.F.R. §§ 6.200-.205, 6.605 *with id.* § 1508.9, some of the requirements that apply to EISs also apply to EAs. For example, an EA should include a concise discussion of: (1) the need for the proposed action; (2) the alternatives to the proposed action; and (3) the environmental impacts of both the proposed action and the alternatives. *Id.* § 1508.9(b). Therefore, in our review, when considering the three elements EISs and EA share in common, we will be considering provisions that are specifically targeted to EISs, but whose underlying principles also apply to EAs. In the process, however, we remain mindful of the fundamental differences between these two types of NEPA documents.

In the analysis that follows, we group Petitioners' challenges in two categories. This is because Petitioners essentially attack the adequacy of the Region's SEA on the following two fronts: (1) they challenge the SEA's scope, which according to Petitioners is too narrow; and (2) they challenge the sufficiency of the NEPA review with respect to the actions the SEA contemplates. We address each of these challenges in turn.

1. *Scope of Region's SEA*

Petitioners question the scope of the Region's SEA by claiming that because the SEA limited its scope ("purpose and need") to the two withdrawn conditions,[116] the Region has not evaluated actions that previous NEPA documents did not contemplate. *See* Second Petition at 27-28. More specifically, Petitioners assert that the Region erred in relying on previous NEPA documents – the FEIS and the ACOE's SEA – because the FEIS and ACOE's SEA did not consider specific CWA and NPDES issues that the Region should have considered in its SEA. *See* Reply Brief at 38. We therefore examine whether the Region erred in adopting the FEIS and the ACOE's SEA as part of its NEPA review.

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[116] The Region's SEA articulates its "purpose and need" as follows: "This Environmental Assessment (EA) has been prepared to further analyze and document environmental consequences associated with the two [withdrawn] NPDES permit conditions under NEPA" Region's SEA at *iii*.

a. *Whether the Region Erred in Adopting Other NEPA Documents in Its NEPA Review*

Our analysis begins with the regulations governing NEPA review. Federal regulations expressly sanction and even encourage an agency's reliance on other NEPA documents when that agency conducts its own NEPA review. Indeed, several CEQ[117] regulations specifically authorize adoption of other NEPA documents, *see* 40 C.F.R. § 1506.3, the combining of environmental documents from different agencies, *id.* §§ 1500.4(n), 1506.4, and "tiering" of a NEPA review.[118] *Id.* §§ 1502.20, 1508.28.

According to section 1506.3(a), "[a]n Agency may adopt a federal draft or final environmental impact statement or portion thereof provided that the statement or portion meets the standards for an adequate statement under these regulations." *Id.* § 1506.3(a). As a general rule, adopting other NEPA documents is appropriate when the proposed action of the agency adopting the EIS is substantially the same as the action the adopted EIS covers. *See id.* § 1506.3(b). Another section that authorizes the adoption or

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[117] *See supra* note 17.

[118] As explained more fully below, tiering is a process that allows the proposing agency, in its own NEPA analysis, to summarize and/or incorporate by reference the environmental impacts addressed in a previous EIS so that the proposing agency can better focus on the narrower site-specific issues of the proposal that merit further evaluation. *See* 40 C.F.R. § 1502.20.

combination of NEPA documents, section 1506.4, provides: "Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork." *Id.* § 1506.4; *see also id.* § 1500.4(n) (an agency may adopt appropriate environmental documents prepared by another agency in order to eliminate duplication).

With respect to tiering, this activity can be considered a form of combining or adopting other NEPA analyses in an agency's own NEPA review. Tiering helps agencies focus on issues ripe for decision or exclude issues already decided or not yet ripe. *Id.* § 1502.20 ("[a]gencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decisions at each level of environmental review"). Thus, the regulations provide that tiering "refers to the coverage of general matters in broader environmental impact statements * * * with subsequent narrower statements or environmental analyses * * * incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared." *Id.* § 1508.28. In the words of the regulations:

> Tiering is appropriate when the sequence of statements or analyses is:
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> * * *
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> From an environmental impact statement on a specific action at an early stage (such as

> need and site selection) to a supplement (*which is preferred*) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

Id. § 1508.28(b) (emphasis added).

In the instant case, the Region adopted a final EIS the U.S. Forest Service issued, which focused on Carlota's Project as a whole – the FEIS. A federal district court has upheld the adequacy of that FEIS.[119] The Region also adopted the final SEA the ACOE issued which focused principally on specific concerns of the ACOE. To the best of our knowledge, no one has challenged the ACOE's SEA. Thus, in this instance, the Region has adopted previous NEPA documents, and later supplemented them with its own environmental assessment that focused solely on issues before the Region. As the regulations make clear, this is not *per se* inappropriate. However, for those actions not covered by the previous NEPA documents, the Region must conduct an adequate NEPA review.

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[119] Region's Response Ex. 20 (*Citizens for the Pres. of Powers Gulch & Pinto Creek v. United States,* No. Civ. 97-2657 PHX-RGS & Civ. 98-806-PHX-RGS (D. Ariz. Sept 15, 1999) (memorandum and order on pending motions for summary judgment)).

Accordingly, the relevant question here is not whether the Region erred in adopting or, as Petitioners put it, in "tiering to" the FEIS and the ACOE's SEA. Instead, we must evaluate whether the Region erred by not considering issues relevant to the proposed agency action that these two documents did not cover, and thus whether the Region's NEPA review was too narrow in scope.

Federal agencies are given considerable discretion to define the "scope" of review of environmental assessment documents. The "scope" consists of the range of actions, alternatives, and impacts to be considered in a NEPA document. 40 C.F.R. § 1508.25. Thus, although agencies must determine the range of alternatives to consider, reviewing courts may find an alternatives analysis inadequate if the agency artificially narrows the objective of its actions to avoid consideration of relevant alternatives. *City of New York v. United States Dep't of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983). With this as background, we now proceed to analyze the issues previously outlined.

b. *Whether the Region Erred by Not Considering Allegedly Relevant Issues Not Covered in Other NEPA Documents*

According to Petitioners, neither the FEIS nor the ACOE's SEA covered the following three issues: (1) alternatives to other NPDES permit conditions, *see* Second Petition at 30; (2) impacts from the Powers

Gulch and Pinto Creek diversion channels and the abandoned mines, *id.* at 35; and (3) a no-mine alternative (i.e., not issuing the Permit, thereby barring Carlota from developing the mine). *Id.* at 33-34. Petitioners argue that the Region should have considered these issues in its SEA, but did not because of the narrow scope the Region adopted.

As a preliminary matter, we observe that the same threshold procedural requirements that apply to appeals of conditions in final NDPES permits apply to our review of NEPA challenges in the context of permit review. *In re Louisville Gas & Elec. Co.*, 1 E.A.D. 687, 690 (JO 1981) ("The relevant considerations which govern the presiding officer's scope of review in a case involving an EIS are no different from those which govern a conventional NPDES proceeding involving specific terms and conditions of a permit"); *see In re Ecoeléctrica, L.P.*, 7 E.A.D. 56, 75 (EAB 1997) (Board denied petitioner's challenges to content of an EIS because petitioner failed to adequately preserve such objections for Board review); *compare* 40 C.F.R. § 6.400 (environmental review process must be consistent with program regulations) *and id.* § 6.603 (NPDES permit proceedings and NEPA review process for new sources must proceed concurrently). It follows then that, as a prerequisite to Board review of Petitioners' challenges to the Region's NEPA review, the issues being challenged should have been raised first with sufficient specificity during the corresponding public comment period,

unless not reasonably ascertainable at the time. *See* 40 C.F.R. §§ 124.13, .19(a).

As explained more fully below, Petitioners have not demonstrated, by pointing to evidence in the record, that the foregoing arguments were preserved or otherwise were not reasonably ascertainable, nor does the record before us show that someone raised these specific arguments during the First Public Comment Period. In our view, these specific arguments should have been raised during the First Public Comment Period – the period designated for comments on the Region's decision to adopt the FEIS and the ACOE's SEA as its NEPA review. We, therefore, will not entertain these arguments. *See, e.g., In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 708 n.16 (EAB 2002) (pointing to petitioner's failure to provide documentation showing that argument raised in support of issue on appeal was not "reasonably available" during the comment period and observing that petitioners bear the burden of demonstrating that arguments have been either preserved or were not reasonably ascertainable during the comment period); *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 519-20 (EAB 2002) ("persons seeking review of a permit must *demonstrate* that any issues or arguments raised on appeal were previously raised during the public comment period on the draft permit, or were not reasonably ascertainable at that time") (emphasis added).

More specifically, we find that Petitioners' argument that the Region should have looked at alternatives to other NPDES permit terms should have been brought to the Region's attention during the First Public Comment Period. The Permit and the Region's decision to adopt the FEIS and the ACOE's SEA were under scrutiny at the time; thus, in our view, this argument was reasonably ascertainable at the time. We, however, have found no evidence in the record showing that this argument was raised during such period.[120] Indeed, the only NEPA argument Petitioners raised in their First Petition pertained to the Region's failure to review the environmental effects from the Gibson Mine cleanup and the discharges from Outfall No. 008. *See* First Petition at 46 ("the EPA cannot rely entirely upon the Forest Service and

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[120] Moreover, even if Petitioners had raised the issue during the First Public Comment Period, we would have declined to entertain this argument on appeal because Petitioners do not specify what other permit conditions in the Permit should have been subject to an analysis of alternatives, nor do Petitioners suggest what those alternatives are. In sum, Petitioners' argument lacks specificity, and therefore, if preserved, we would have nonetheless denied review. *See, e.g., In re New England Plating Co.*, 9 E.A.D. 726, 739 (EAB 2001) (finding that petition lacked sufficient specificity for the Board to make a determination on the issue presented by petitioner and concluding that the permit issuer did not clearly err; stating that to warrant review allegations must be specific and substantiated); *see also In re Envotech, L.P.*, 6 E.A.D. 260, 267 (EAB 1996) (denying review of petitions for lack of specificity); *cf.* 40 C.F.R. § 1503.3 (stating that comments on an EIS or on a proposed action need to be as specific as possible).

Corps NEPA documents because the EPA has proposed new activities [referring to the Gibson Mine cleanup and discharges from Outfall No. 008] for the first time in their Final NPDES Permit that were never contemplated or reviewed by the Forest Service or Corps when those agencies conducted their own NEPA analyses"); *see also id.* at 47-49.

Petitioners also argue that the Region's NEPA review fails to consider discharges from the Powers Gulch and Pinto Creek diversion channels and from abandoned mines. Petitioners raised these challenges along with the objections to the Permit they raised during the Second Comment Period, which we already addressed in Parts III.A.2 and .3 of this decision.[121] In the NEPA context, Petitioners assert that the Region's SEA fails to adequately describe the environmental impacts from ground water diverted into the Pinto Creek diversion channel and its relationship to stream standards and antidegradation requirements. Second Petition at 35. Petitioners further assert that the Region's SEA fails to fully review the copper loading from the inactive mines and the additional dumping of alluvial material into

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[121] *See supra* Part III.A.2 (Petitioners argue that this Permit should regulate discharges from the diversion channels into Pinto Creek and Powers Gulch at the point where the diversion channels rejoin the original stream); *see also supra* Part III.A.3 (Petitioners argue that this Permit should have regulated discharges from inactive mines located on or near Carlota's property). We denied both challenges on threshold procedural grounds.

the Pinto Creek diversion channel. *Id.* We, however, will not entertain these arguments. Petitioners have not demonstrated that the arguments about the environmental impacts from ground water diverted into the Pinto Creek diversion channel and the inactive mine sites were raised in the First Public Comment Period, when they should have been raised. Nor have Petitioners shown that these issues were not reasonably ascertainable at that time.

Petitioners also failed to preserve for Board review their argument that the Region's SEA is inadequate because it did not consider the "no-mine" alternative; that is, not issuing the Permit. Petitioners argue that by narrowing the NEPA review to only two courses of action, the Region avoided considering the "true" no action alternative, as Petitioners put it, of not granting the Permit, thereby barring Carlota from developing the mine. Second Petition at 34 ("while the no-action alternative equates with no mitigation, it also equates with no mine at all"). According to Petitioners, not granting the Permit would result in "vast" environmental benefits. *Id.* These arguments we will not entertain. Similar to the previous arguments, Petitioners have not demonstrated, nor have we found any record, that this specific argument was raised during the First Public Comment Period. Likewise, Petitioners have not demonstrated that this issue was not reasonably

ascertainable at that time. We, therefore, deny review of this issue as well.[122]

In sum, Petitioners have not demonstrated that the arguments they raise in support of their challenge to the "scope" of the Region's SEA were raised during the First Public Comment Period or were not reasonably ascertainable and therefore preserved for Board review. These arguments should have been raised during the First Public Comment Period because they relate to the Region's decision to adopt the FEIS and the ACOE's SEA as its NEPA review. In addition, we do not find clear error in the Region's decision to adopt the FEIS and the ACOE's SEA as part of its NEPA review. We thus decline to grant review on the basis that the scope or "purpose and

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[122] Even if this argument had been preserved, we would have denied review, as NEPA does not require a separate alternatives analysis if the alternatives actually considered have substantially similar consequences. *See Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1180-81 (9th Cir. 1990); *N. Plains Res. Council v. Lujan*, 874 F.2d 661, 666 (9th Cir. 1989). The FEIS essentially considered the no-mine alternative, but the FEIS called it instead the no-action alternative. This alternative, the FEIS explains, "would preclude the development of the Carlota Copper Project on the public lands in question; the ore reserves in the area would remain undeveloped. The no action alternative assumes the continuation of the existing conditions in the project area." FEIS vol. I at *xii*; *see also id.* tbls. 2.16a-.16p, at 2-91 to -116. Thus, it is clear that the Region's SEA did not have to consider the no-mine alternative of not granting the permit; the effect would have been the same as the FEIS no-action alternative – to preclude Carlota from developing the Project.

need" of the Region's SEA is too narrow.[123] We now turn to the second group of challenges; that is, Petitioners' challenges to the adequacy of the NEPA review on the actions the Region's SEA contemplates.

2. *Adequacy of Analysis of Actions Contemplated by the Region's Supplemental Environmental Assessment*

Petitioners question, on three different grounds, the adequacy of the NEPA analysis the Region conducted regarding the two courses of action the Region's SEA contemplates – the proposed agency action, identified in the SEA as the no-action alternative, which entails the issuance of the Permit without the two permit conditions, and the preferred action alternative, which consists of implementing the two withdrawn permit conditions to eliminate any effects associated with approving Carlota's discharges. *See* Region's SEA at iv-v. Petitioners argue that: (1) the Region's SEA fails to consider a reasonable range of alternatives, *see* Second Petition at 28-34; (2) the Region's SEA "fails to take the requisite 'hard look' at the direct, indirect, and cumulative environmental impacts of the proposed action," *id.* at 27, 35-39; and (3) the Region predetermined the decision it reached in the SEA. *Id.* at 28, 34-35. We address each of these arguments in turn.

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[123] We note however that some of the actions Petitioners argue the Region's SEA ignored were actually addressed in the FEIS. *See supra* note 122.

a. *Range of Alternatives*

In analyzing the environmental impact of the two courses of action contemplated in its SEA, the Region focused on the preferred action alternative. Petitioners claim that the approach the Region adopted of considering only two courses of action is erroneous because other alternatives to the proposed actions should have been evaluated. Petitioners point to various alternatives that the Region allegedly did not consider. These alternative are: (1) removing copper loadings into Pinto Creek that are associated with inactive mine sites located between Carlota and the Gibson Mine, Second Petition at 31; (2) prohibiting new discharges until Carlota eliminates the Cactus Breccia Formation, *id.* at 31-32; (3) resolving the scientific uncertainties surrounding the Gibson site before permitting, *id.* at 32; and (4) testing and lowering the predicted high-temperature wellfield water prior to discharge, *id.* at 31.

We note, as background, that an agency retains discretion to determine the appropriate number and range of alternatives to consider in its review of the environmental impact of a proposed action. *See Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 551-52 (1978). The law is clear that the agency is responsible for selecting alternatives for consideration. *See City of New York v. U.S. Dep't of Transp.,* 715 F.2d 732, 742 (2d Cir.1983). Agencies must, however, in selecting alternatives for consideration, "explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a). The rule of

reason governs the selection or choice of alternatives as well as the extent to which an agency must discuss each alternative. *City of Carmel-by-the Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997). Accordingly, an agency does not have to consider every possible alternative, as long as it considers an appropriate range of alternatives. *See Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1180-81 (9th Cir. 1990).

As mentioned earlier, the same general principles agencies must follow in analyzing alternatives for EISs apply in the EA context.[124] However, several courts have held that when an agency determines the proposed action will have minimal effects on the environment, the range of alternatives an agency must consider in an EA to satisfy NEPA requirements can be narrower than when the agency has made a determination of significant impact. *See, e.g., Cent. S.D. Co-op. Grazing Dist. v. Sec'y of U.S. Dep't of Agric.*, 266 F.3d 889, 897 (8th Cir. 2001) ("When an agency has concluded through an Environmental Assessment that a proposed project will have a minimal environmental effect, the range of alternatives it must consider to satisfy NEPA is diminished."); *Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1558 (2d Cir. 1992) ("Indeed, the range of alternatives an agency must consider is narrower when, as here, the agency has found that a project will not have a significant environmental impact");

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[124] *See supra* note 115.

see also North Carolina v. F.A.A., 957 F.2d 1125, 1134 (4th Cir. 1992) ("In an environmental assessment, the range of alternatives an agency must consider is smaller than in an impact statement"). Moreover, it is well-established that, while an EA serves to determine whether to prepare an EIS, EAs are, as opposed to EISs, concise documents, which content, the regulations prescribe, can be limited to a brief discussion of alternatives and the need for the proposal. *See* 40 C.F.R. § 1508.10 (stating that EAs are concise public documents that serve to briefly provide sufficient evidence and analysis for determining whether to prepare an EIS or to aid the agency's compliance with NEPA when no EIS is necessary); *see also id.* § 1508.12 (stating that EISs are detailed written statements).

Regardless of the type of analysis, whether an EA or EIS, agencies must consider alternatives that further the proposal's goal. *City of New York*, 715 F.2d at 743. Agencies, however, are not required to consider alternatives "whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative." *Life of the Land v. Brinegar*, 485 F.2d 460, 472 (9th Cir. 1973). But, if the agency unreasonably fails to consider viable alternatives, a court may find its alternatives analysis inadequate. *See Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992); *see also Surfrider Found v. Dalton*, 989 F. Supp. 1309, 1326 (S.D. Cal. 1998) ("if the agency unreasonably failed to include a viable alternative among its list of finalists, its alternatives

analysis would be inadequate even if the selected site was clearly superior"). Furthermore, NEPA does not require a separate analysis of alternatives that are not significantly distinguishable from alternatives actually considered, or that have substantially similar consequences. *Headwaters, Inc. v. BLM,* 914 F.2d 1174, 1180-81 (9th Cir. 1990); *N. Plains Res. Council v. Lujan,* 874 F.2d 661, 666 (9th Cir. 1989); *NRDC v. SEC,* 606 F.2d 1031, 1054 (D.C. Cir. 1979).

In sum, if an alternative is viable, meets the proposal's goal, and is significantly distinguishable from other alternatives the agency is considering, the agency conducting the environmental review must consider such alternative. With this as background, we now determine whether the Region should have considered in its SEA any of the "alternatives" Petitioners list.

Upon examination, we find no clear error in the Region's choice of alternatives, in light of the Region's fording that the preferred action will not have a significant environmental impact,[125] and in light of the evidence in the record, which shows that the

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[125] *See* discussion *supra* explaining that the range of alternatives in an EA when an agency has found that a project will not have a significant environmental impact can be narrower than the range required when a determination of significant impact has been made. *See, e.g., Cent. S.D. Co-op. Grazing Dist. v. Sec'y of U.S. Dep't of Agric.,* 266 F.3d 889, 897 (8th Cir. 2001); *Friends of the Ompompanoosuc v. FERC,* 968 F.2d 1549, 1558 (2d Cir. 1992); *North Carolina v. F.A.A.,* 957 F.2d 1125, 1134 (4th Cir. 1992).

Region either considered or did not have to consider each of the alternatives Petitioners propose. More specifically, the record shows that some of the alternatives Petitioners claimed the Region's SEA should have considered but allegedly ignored were actually addressed in the Region's SEA (i.e., elimination of the Cactus Breccia Formation; monitoring and analysis of wellfield pumping) or covered in the FEIS (i.e., the no-mine alternative; monitoring and analysis of wellfield pumping; mitigation of water temperature). For those that were not covered in the SEA or earlier NEPA reviews, we find that Petitioners either failed to preserve the argument for Board review, or that NEPA does not require their evaluation (i.e., removal of copper loading from other inactive mine sites; resolution of scientific uncertainties before permitting). Our analysis follows.

i. *Removal of Copper Loadings from Other Inactive Sites*

Petitioners identify, as a proposed alternative to the partial remediation of the Gibson Mine, the removal of copper loadings from the inactive mine sites located *between* Carlota and the Gibson Mine.[126]

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[126] Second Petition at 31 ("[a]nother alternative proposed by Petitioners was to first remove other copper loadings from inactive mine sites. These sites discharge into Pinto Creek between Carlota and Gibson (much closer to Carlota)").

Petitioners assert that the Region should have but did not consider this option in its SEA. Second Petition at 31. On appeal Petitioners argue that, because these inactive mine sites are much closer to Carlota, any cleanup of these sites will have directly measurable benefits in the Carlota reach of Pinto Creek. *Id.*

Our examination of the record shows that this specific alternative was not raised during the Second Public Comment Period. The emphasis in the comments was on eliminating *all exceedances* of copper in Pinto Creek prior to allowing discharges from Carlota. For instance, Friends of Pinto Creek, one of the petitioners in this case, proposed in its comment letter that Carlota "remedy the entire Carlota Project area and eliminate (1) discharges that violate the CWA and (2) exceedances *in all reaches* of Pinto Creek in and above the project area * * * ." Response to Comments Second Comment Period at 11 (Comment #26-8) (emphasis added). In the same comment letter, Friends of Pinto Creek proposed the following alternative "for comparison alongside the proposed Gibson alternative[:] Prior to issuance of an NPDES Permit, insist that *all copper exceedance* is removed from Pinto * * * . Define the reaches of Pinto that have exceedances and then develop a plan *to eliminate them all.*" *Id* at 55 (Comment #26-98) (emphasis added). The Western Action Mining Project, a commenter participating in the Second Public Comment Period, raised the following concern and alternative: "Although there are facilities *above and below* ground at the Gibson Mine, which contribute to pollutant

loading in Pinto Creek (such as the Yo Tambien and Bronx Properties) the EA does not consider the possibility of requiring Carlota to remediate or remove these potential pollution sources *in addition* to the limited Gibson Mine cleanup." *Id.* at 89 (Comment #32-18) (emphasis added).

The Region responded to this group of comments by noting the impact expected from the Gibson cleanup. The Region stated its response to comments as follows: "[A] significant reduction in copper loading from the Gibson Mine would be expected as a result of the proposed action * * * ." *Id* at 6 (Response #26-1); *see also id* at 7-8, 10, 13-14, 54 (Responses #26-2, -3, -5, -11 to -13, -96). According to the Region, the reductions of copper loadings resulting from the Gibson Mine cleanup are so significant that they would more than offset Carlota's discharges. *See also* discussion *supra* Part III.B.1.a.ii.

We do not see clear error in this response. As explained earlier, an agency does not have to consider every available alternative, nor does it have to consider alternatives that do not further the proposal's goal. *See Headwaters,* 914 F.2d at 1180; *City of New York,* 715 F.2d at 743. The goal of the proposed action is to provide an appropriate offset for Carlota's discharges. The goal of the proposal is not, as Petitioners and other commenters seemed to believe, the restoration of the entirety of Pinto Creek to water quality standards. While desirable, this is not the intent of the proposed action. The Region understandably viewed the comments raised during the Second Public

Comment Period, not as setting forth an alternative to the offsetting of Carlota's discharges, but as a request for the development of a broader plan to cleanup Pinto Creek in its entirety.[127] As such, the Region did not have to consider this particular proposal to satisfy its NEPA obligations.

In contrast, on appeal Petitioners emphasize the cleanup of inactive mine sites *between* Carlota and the Gibson Mine *as an alternative* to the Gibson Mine cleanup. Petitioners also purport to identify a difference between the Gibson Mine cleanup – the alternative the Region proposed and discussed in the SEA – and the cleanup of facilities located between Carlota and the Gibson Mine. Petitioners argue that the cleanup of this segment of Pinto Creek would have directly measurable benefits in the Carlota reach. Second Petition at 31. We, however, have found no evidence in the record that the specific arguments Petitioners now raise on appeal were raised during the Second Public Comment Period. Moreover, nothing in the Region's response to comments indicates that the Region viewed the alternative advanced in comments below as encompassing the more specific alternative now propounded on appeal. To expect the Region to have inferred from Petitioners' comments

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[127] Indeed, in its response to comments the Region pointed to the Pinto Creek TMDL as the plan devised for such purposes. *See* Response to Comments Second Comment Period at 7 (Response #26-2) ("Other sources from the area are appropriately analyzed and addressed in the TMDL.").

the alternative now raised on appeal would be unreasonable and place an inappropriate burden on the Region. Having been given a specific opportunity to comment on the permit condition pertaining to the Gibson Mine and on the Region's SEA, it is simply too late for Petitioners in their second appeal to suggest cleanup of other sites in lieu of the Gibson cleanup.[128] We, thus, deny review of these arguments.[129]

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[128] Additionally, even if we were to read the alternative Petitioners propound on appeal not as an alternative to the Gibson Mine cleanup but, as proposed in comments below, *in addition to* the Gibson Mine cleanup, we would have denied review. As noted above, an agency does not need to consider alternatives that do not further the proposal's goal. The alternative propounded in comments below, as we previously explained, clearly goes beyond the proposed action's goal. The Region, thus, had no obligation to consider such proposal.

[129] Furthermore, Petitioners have failed to demonstrate that any cleanup of the "undesignated mine sources," as referred to in the Pinto Creek TMDL, between Carlota and the Gibson Mine would have directly measurable benefits in the Carlota reach, and, if so, how this benefit would be significantly distinguishable from the benefits expected from the partial remediation of Gibson. While one might speculate that the cleanup of sources located in closer proximity to the Carlota Project would provide a more palpable benefit to the Carlota reach, this inference might not hold true in this case. The record here shows a marked difference between the copper loadings into Pinto Creek attributable to the two sources in question – the undesignated mine sources and the Gibson Mine. According to the Pinto Creek TMDL, the copper loadings into Pinto Creek associated with the Gibson Mine are far greater than the copper loadings projected from the "undesignated mine sources." For instance, Gibson's projected loading for a 10-year, 24-hour storm event is 49,652 kg/day, while the undesignated mine sources' projected loading

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ii. *Prohibiting New Discharges Until Elimination of Cactus Breccia Ore Formation*

Petitioners claim that the Region erred because it did not consider, as an alternative in its NEPA review, prohibiting new discharges into Pinto Creek until complete cleanup of the Cactus Breccia ore formation. *See* Second Petition at 31-32. We disagree. The Region's SEA did consider the elimination of the Cactus Breccia ore formation to reduce copper loadings into Pinto Creek. *See* Region's SEA at 13. The SEA's alternative contemplated the mining of the Cactus Breccia ore body and construction of the Pinto Creek diversion channel as an offset for dissolved copper loadings associated with Carlota's discharges. *Id.* The Region, however, eliminated the alternative from consideration. The Region's SEA explains as follows:

> [T]he EPA formulated this alternative but ultimately eliminated it from further consideration because the Pinto Creek diversion channel would not be completed prior to the

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for the same event is 384.3 kg/day. *Compare* Pinto Creek TMDL App. C tbl. C-3 *with* App. C tbl. C-4. Other than a bare-bones assertion that these other mines are closer to Carlota's Project, Petitioners make no showing that the cleanup of these other mines would be significantly distinguishable from the alternative actually considered. Because the burden of demonstrating that review is warranted is on the person seeking review, even if this issue had been preserved, we would have, nonetheless, denied review of Petitioners' arguments.

> onset of mining of the Cactus Breccia ore body and the disposal of waste rock. Consequently, an offset for loadings of dissolved copper would not be achieved during the initial phases of mining. For this reason, this alternative was not considered a technically feasible means of providing a loading offset.

Id. The record before us makes clear that the Region gave consideration to this alternative but eliminated it from further consideration because the diversion channel would not be completed prior to the onset of mining of the ore body, and because the Region expects the Gibson Mine cleanup to provide significant reductions in copper loading. *See* Region's Response at 37.

As noted previously, NEPA only requires that the proposing agency explore and evaluate reasonable alternatives, and for alternatives eliminated from detailed study, briefly discuss the reasons for their having been eliminated. *See* 40 C.F.R. § 1502.14(a). The Region's SEA fully meets this requirement. We, therefore, decline to grant review on this basis.

iii. *Resolve the Scientific Uncertainties Surrounding the Gibson Site Before Permitting*

Petitioners further suggest that the Region's SEA should have considered, as an alternative to the proposed actions, delaying issuance of the Permit until after resolution of certain uncertainties about the copper loadings into Pinto Creek attributable to

the Gibson Mine. *See* Second Petition at 32. Petitioners claim that the Gibson Mine remediation analysis is based on a faulty TMDL. *See id.* at 37. The Pinto Creek TMDL, Petitioners assert, relies on incomplete, unreliable data and thus the Region should have considered not issuing the permit until the gathering of new data. Upon examination of the record, we conclude that the Region did not have to consider this alternative in the SEA.

By suggesting delaying permit issuance until the collection of new data, Petitioners are, once again, challenging the adequacy of the offset condition in the Permit. Delaying permit issuance until the gathering of new data strikes us as an unreasonable alternative because the analyses in the Pinto Creek TMDL and the Region's SEA show that the remediation project will more than offset Carlota's permitted discharges. Moreover, as noted previously in this decision, *see supra* Part III.B.1.a, we have no reason to question the data relied upon by the Region, especially because, to the best of our knowledge, the Pinto Creek TMDL has not been challenged in the proper forum.[130] As we stated earlier, having considered and adequately explained the basis for its offset analysis in both the SEA and the Pinto Creek TMDL, we decline to second-guess the Region's technical judgment. To expect the Region to have evaluated

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[130] For a discussion of why Petitioners may generally not challenge the TMDL in this forum, see *In re City of Moscow*, 10 E.A.D. 135, 161 (EAB 2001).

delaying issuance of the permit, as an alternative to the preferred proposed action of issuing the permit with mitigation conditions, is unreasonable and would have unjustifiably deprived Carlota of its permit. The Region certainly possesses the authority, when it deems it appropriate, to require an applicant to gather more information before the Region decides whether to issue a permit. However, here, where the Region has determined that issuing the permit is appropriate, and the record (including an unchallenged TMDL) validates such decision, it strikes us as unreasonable for the Region to be required to consider subjecting an applicant to what can fairly be considered an unnecessary delay. As noted earlier, an agency has no obligation to consider unreasonable alternatives. We, therefore, find that the Region did not have to consider the alternative Petitioners propound.

iv. *Testing and Lowering the Predicted High-Temperature Wellfield Water Prior to Discharge*

Petitioners further contend that the Region's SEA failed to include an alternative that "tested and remediated the predicted high-temperature wellfield water **prior to** discharge." Second Petition at 31. Petitioners raised a similar argument during comments below, stating their argument during the comment period as follows:

> EPA also failed to analyze alternatives to the wellfield mitigation plan. The EA should

> have considered an alternative whereby monitoring and analysis of wellfield pumping is done prior to *the mine facility construction,* as well as alternatives that discuss how Carlota will mitigate for water temperature variances.

Response to Comments Second Public Comment Period at 90 (Comments #32-20) (emphasis added). Petitioners identify on appeal two "alternatives" that, in their view, the SEA should have covered: (1) an alternative whereby monitoring and analysis of wellfield pumping is done prior to discharge,[131] and (2) an alternative that discusses how Carlota will mitigate for water temperature variances. We analyze each "alternative" in turn.

(1) *Monitoring and Analysis of Wellfield Pumping Prior to Discharge*

Contrary to Petitioners' argument, the Region's SEA contemplates testing and monitoring of wellfield pumping prior to discharge. As already explained in

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[131] Although during the comment period Petitioners' concern was that wellfield water discharges be tested prior *to the mine facility construction,* on appeal their argument is slightly different. On appeal, Petitioners argue about testing and monitoring *prior to discharge.* These are two different concerns because they require testing and monitoring during different stages of the Project (e.g., prior to construction versus prior to operation); nonetheless, because they are sufficiently related, we treat the argument on appeal as preserved for Board review.

Part III.B.1.b of this decision, the FEIS lays out a general workplan for testing wellfield water pumping (WR-2) prior to operation of the mine. The Region's SEA identifies the lack of water temperature monitoring requirements in workplan WR-2. Based on this finding, EPA requested the U.S. Forest Service to amend the Wellfield Mitigation Program to include water temperature monitoring requirements during testing and during periods of wellfield mitigation discharges. *See* Region's SEA at *vii*, 29. The Region's SEA explains as follows:

> In a letter dated March 27, 2001, EPA requested that the [Forest Service], in cooperation with the Carlota Copper Co., amend the Wellfield Mitigation Program to include temperature monitoring. The [Forest Service] concurred with EPA's request in a letter dated April 17, 2001. In this letter, Tonto National Forest agreed to amend the workplan prepared for additional wellfield and aquifer testing as required by mitigation measure WR-2 in the Final EIS to include *continuous and concurrent water temperature monitoring* of the wellfield mitigation discharges and ambient stream water *during testing of the wellfield program*; daily water temperature measurements of wellfield mitigation discharges and ambient instream water during testing of a mitigation measure; and revision of the Ground and Surface Water Monitoring Plan to include daily or weekly water temperature measurements of mitigation discharges and instream flows

> during periods of wellfield mitigation discharges.

Id. at *vii* (emphasis added). The testing of the wellfield program, WR-2, is scheduled to occur prior to wellfield production; that is, during mine construction, but prior to wellfield production for operating the mine. In other words, the testing will occur prior to mitigation discharges.[132] *See* FEIS at 3-137.

Because we find that the Region's SEA and the FEIS considered the alternative Petitioners propose – monitoring and analysis of wellfield pumping prior to discharge – we deny Petitioners' request for review on this basis.

(2) *Mitigation of Water Temperature*

Petitioners also contend that the Region's SEA failed to contemplate an alternative that evaluates how Carlota will mitigate temperature variances when discharging from Outfall No. 008. *See* Second Petition at 31. This contention also relates to Petitioners' argument that the Region failed to take a

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[132] Note that discharges from Outfall No. 008 are only intermittent, triggered by Carlota's consumption of wellfield water. *See supra* note 70. Carlota intends to use wellfield water as supplemental water supply to sustain the Project needs. As such, discharges from Outfall No. 008 would not occur until after construction of the mine, except for discharges occurring during the testing period, if any.

"hard look" at the impacts of Carlota's discharges, *see id.* at 35-39, which will be fully discussed below. Of interest now, however, is Petitioners' argument that the Region's SEA did not include a mitigation plan for wellfield discharges from Outfall No. 008 to account for temperature exceedances and did not discuss any of the environmental impacts from any future mitigation. *Id.* at 36. According to Petitioners, "[I]f a treatment plant or other facility is needed to reduce the water temperature to meet the standards, that facility may likely involve substantial ground disturbances, visual impacts, and other effects that have not been reviewed." *Id.*

The Region argues that the NEPA review considered potential temperature mitigation and adequately accounted for impacts from any necessary mitigation. Region's Response at 31. The Region states that, while the Region's SEA does not necessarily cover mitigation measures for temperature and environmental impacts from any mitigation, the FEIS adequately covers these elements. *Id.* The FEIS, the Region explains, addresses potential impacts from any necessary cooling mechanisms because it covers the environmental effects on approximately eight "acres of disturbances for development of well sites, pipeline, pump station, power line and access roads," related to the Wellfield Mitigation Program. *Id.* at 33. The Region claims that the SEA, for its part, "analyzes minor and insignificant potential impacts to vegetation, aesthetics and visual resources from construction of pipelines from the wellfield to surface

water discharge points." *Id.* These analyses, according to the Region, are sufficient to encompass any impacts from construction of temperature mitigation measures. *Id.* at 34.

Petitioners reply by contending that the Region cannot rely on the FEIS. Petitioners argue that the temperature issue became a critical part of the NEPA review only after completion of the FEIS. Therefore, Petitioners reason, the FEIS does not adequately address temperature mitigation measures and their environmental impact. Reply Brief at 38. For the reasons set forth below, we disagree.

We note first that in reviewing NEPA challenges the Board has adopted the so-called "rule of reason" employed by the federal courts,[133] which we have equated to a "reasonableness" standard.[134] *See In re*

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[133] *See, e.g., Edwardsen v. U. S. Dep't of Interior*, 268 F.3d 781, 785 (9th Cir. 2001) ("We review an EIS under a rule of reason to determine whether it contains a 'reasonably thorough discussion of the significant aspects of probable environmental consequences.'") (quoting *Neighbors of Cuddy Mountain v. U. S. Forest Serv.*, 137 F.3d 1372, 1376 (9th Cir. 1998)).

[134] In *Marsh v. Oregon Natural Resource Council*, 490 U.S. 360 (1989), the Supreme Court noted that the "reasonableness" standard has not been adopted by all of the circuits and that some courts have adopted instead the "arbitrary and capricious" standard. The Supreme Court also noted that the difference between these two standards is of no pragmatic consequence. *Id.* at 377 n.23. The Ninth Circuit, however, applies both standards depending upon whether the question is one of fact or law. *See Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 666-67 (9th

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Dos Republicas Res. Co., 6 E.A.D. 643, 663 (EAB 1996) (finding that the Region's treatment of a particular alternative met the "rule of reason" standard under NEPA); *see also In re Louisville Gas & Elec. Co.*, 1 E.A.D. 687, 694 (JO 1981) (stating that an agency's actions under NEPA are to be measured against standards of reasonableness and due regard must be given to all of the surrounding circumstances). Accordingly, our role in reviewing compliance with NEPA consists of ensuring that the agency has adequately considered and disclosed the environmental impacts of the proposed actions in light of the totality of the circumstances. We now turn to the Region's obligations under NEPA with regard to the evaluation of mitigation measures and the evaluation of environmental impacts.

We begin by examining federal cases that have addressed this topic. The Supreme Court has held that NEPA does not impose a substantive duty on agencies to mitigate adverse environmental effects of the proposed action or to include in each environmental impact statement or assessment a fully developed mitigation plan. *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 333 (1989) ("There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences

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Cir. 1998) (*citing Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723 (9th Cir. 1995)).

have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other."). NEPA, however, requires that the environmental effects of a proposed action be adequately identified and evaluated. *Id.*; *City of Carmel-by-the Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1154 (9th Cir. 1997) ("Mitigation must 'be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.' * * * An [EIS] need not contain a 'complete mitigation plan' that is actually formulated and adopted.'"); *see also Akiak Native Comty. v. U. S. Postal Serv.*, 213 F.3d 1140, 1147 (9th Cir. 2000) ("NEPA does not require that *environmental assessments* include a discussion of mitigation strategies, even though regulations require discussion of means to mitigate adverse environmental impacts in environmental impact statements.") (emphasis added).

It is plain that, under applicable case law, the Region did not have to include in its NEPA review measures to mitigate temperature impacts from the discharges from Outfall No. 008, especially because, as explained earlier in this decision, it is still unknown whether temperature controls will in fact be needed. *See supra* Part III.B.1.b (explaining that it would not be until after completion of the testing phase that Carlota would know if mitigation discharges will in fact be needed, and noting that even if mitigation discharges are needed, temperature control mechanisms might not be needed depending upon

the selected choice of mitigation water, the location and mechanisms of discharge, and the method of conveyance). We, therefore, find that the relevant question here is not whether the Region failed to include a fully developed mitigation plan for controlling any temperature exceedances from Outfall No. 008, but whether the environmental effects associated with the discharges from this outfall were adequately identified and evaluated in the NEPA documents.

Upon consideration of the record, we find that the impacts were adequately identified and evaluated. The Region's SEA, for example, discusses impacts to the physical, biological, and cultural environments associated with the discharges from Outfall No. 008. Region's SEA at 15-47. The physical environment the SEA analyzes includes impacts on climate, air quality, visibility, odor, geology, soil, surface water, and ground water. *See id.* at 15-31. The biological environment the SEA covers includes vegetation, wetlands, wildlife, and threatened species. *Id.* at 31-36. The cultural environment the SEA discusses includes historical and archaeological resources, land use and infrastructure, hazardous and solid waste, noise, visual and aesthetic resources, socioeconomics, recreation, wilderness, wild and scenic rivers, and transportation. *Id.* at 36-47.

The Region's SEA does not cover impacts addressed in the FEIS, which include potential impacts to soils and geology associated with the Project. *See id.* at 17. The Region's SEA does cover, nonetheless,

environmental impacts to surface water quality associated with discharges from Outfall No. 008. The SEA states in pertinent part:

> Impacts to surface water quality would not be expected by discharging ground water to Haunted Canyon, Powers Gulch or Pinto Creek under the conditions specified by the wellfield mitigation program. Table A-3 in Appendix A summarizes analytical data for the stream reaches that would be potentially affected by discharges associated with the wellfield mitigation program. * * * Table A-3 shows that the alluvial and bedrock aquifer waters are chemically similar to surface water in Haunted Canyon. Samples collected from the bedrock aquifer, however, indicate that this aquifer is at a higher temperature than the alluvial ground water and Haunted Canyon surface water (Table A-4). *Depending on the amount of cooling that occurs during conveyance, the mechanisms of discharge and the extent of mixing with surface waters, the receiving waters could potentially be impacted by increased temperature if bedrock ground water is discharged directly to the stream.* However, the wellfield discharge is required to meet Arizona water quality standards, which preclude an increase of ambient temperature by more than 3° Celsius.

Id. at 27-28 (emphasis added).

In our view, the SEA's coverage of the environmental impacts associated with the discharges from Outfall No. 008 are adequate under NEPA. With

regard to impacts on water quality, the SEA identifies a potential problem. It notes that direct discharges of wellfield ground water into the stream can potentially impact the receiving water. The SEA suggests, however, that the mechanism of discharge eventually selected could help avoid the problem. The Region's SEA notes that discharges from Outfall No. 008 are to comply with the Arizona water quality standards and identifies the need for temperature monitoring during and after the testing stages of the Wellfield Mitigation Program. *Id.* at 29. It also lays out the steps the Region has taken to ensure Carlota monitors temperature during and after the testing stage. *Id.* These analyses, coupled with the uncertainty about the need for discharges from Outfall No. 008 and consequently the need for temperature controls, are, in our view, sufficient under NEPA. Although it might have been desirable for the Region to analyze different cooling options, under the rule of reason, given the circumstances here, we find it acceptable to proceed in the absence of that analysis.

Furthermore, with regard to Petitioners' argument that the Region's SEA does not discuss any of the environmental impacts from any future mitigation for temperature, such as ground disturbances, visual impacts, and other effects, we agree with the Region. Although not discussed with the level of specificity Petitioners desire, the analyses in the SEA and FEIS sufficiently cover these impacts. The Region's SEA identified impacts to the physical environmental that may result from allowing mitigation

discharges. The SEA states: "The proposed alternative would result in increases in ambient noise levels at the site of the wellfield mitigation program," and the "[a]ctivities associated with the proposed alternative may require the use of construction equipment to install transmission pipes for the wellfield mitigation program." *Id.* at 42. However, the SEA continues, "[t]hese activities would be temporary in nature and noise levels are expected to return to pre-activity levels upon completion of the installation activities." *Id.* The FEIS, for its part, covers general impacts associated with the entire Project. The FEIS, thus, analyzes the Project's impacts on 1,428 acres – the area the FEIS found the Project will disturb. *See* FEIS at 2-1. To put this in perspective, the FEIS expects the wellfield supply facilities to disturb a total of eight acres. We find that even though the FEIS does not analyze environmental impacts associated with the development of temperature controls for mitigation discharges *per se,* it nonetheless covers the environmental impacts associated with the construction and operation of the Wellfield Mitigation Program in that the eight acres are within the overall project area. The FEIS analysis includes disturbances associated with well sites, pipelines, pump stations, power lines, access roads, and storage tanks. *Id.* Therefore, it is reasonable to assume that any impacts associated with any cooling facilities or temperature controls are covered in the FEIS and SEA, collectively.

In sum, we do not find clear error in the Region's selection of alternatives. Based on the alternatives covered in the FEIS and SEA, the Region's range of alternatives satisfies NEPA.

b. *EPA's Alleged Failure to Take a "Hard Look" at the Impacts from the Discharges*

Petitioners also argue that the Region failed to take a "hard look" at the impacts from the discharges because the Region failed to obtain adequate baseline information and accurate scientific analysis. Second Petition at 37-39. According to Petitioners, the Region "cannot ensure that the discharges will not violate ambient-based requirements when the agency admits that baseline conditions are yet to be established." *Id.* at 37. Petitioners point to statements by the Region in the Permit Fact Sheet and the Pinto Creek TMDL in which, Petitioners allege, the Region acknowledges the need for baseline information gathering and pledges to obtain it after permit issuance. *Id.* (citing Pinto Creek TMDL at 26; Fact Sheet at 19). In addition, Petitioners assert that the whole Gibson Mine remediation project is based on a faulty TMDL and that NEPA prohibits reliance upon conclusions or assumptions that are not supported by scientific or objective data. *Id.* at 37, 39. Petitioners cite to 40 C.F.R. §§ 1502.24 (agency's obligation to insure professional and scientific integrity in EISs) and 1502.22 (incomplete or unavailable information), and argue that the Region failed to comply with the obligations

set forth in these sections. Second Petition at 38; Reply Brief at 44 ("The agency admits that 'adequate information' is still lacking, but has not, and cannot, demonstrate that 'the costs are exorbitant or the means of obtaining the information are not known.'").

Our examination of the record does not show that these arguments – lack of baseline information and accurate scientific analysis – were raised during the Second Public Comment Period, and Petitioners have not demonstrated, by pointing to evidence in the record, that these arguments were raised below. We therefore deny review of these arguments.[135] *See, e.g.*,

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[135] Moreover, even if Petitioners had demonstrated that these arguments were preserved for Board review, we would not have granted review for various reasons. First, none of the regulatory requirements Petitioners cite as having been violated apply here. Petitioners cite to provisions in 40 C.F.R. part 1502, which specifically apply to EISs. Part 1502 establishes, among other things, content requirements, including certain showings the proposing agency must make when confronted with incomplete and insufficient information. For instance, section 1502.22 of 40 C.F.R., cited by Petitioners, requires agencies to identify the areas where information is either incomplete or unavailable. Depending on the relevance and cost of obtaining such information, section 1502.22 provides that agencies must obtain and include the information in the EIS. *See* 40 C.F.R. § 1502.22. Petitioners here claim that the Region's SEA did not make any of the showings specified in section 1502.22. These obligations, however, are triggered by a finding of *significant* impact. There is no such finding here. Second, the NEPA regulations – the EPA-specific NEPA regulations found at 40 C.F.R. pt. 6 and the CEQ regulations found at 40 C.F.R. pts. 1500-1508 – do not establish any specific requirements similar to the ones Petitioners propose. Rather, the regulations only provide that an EA

(Continued on following page)

In re Avon Custom Mixing Servs., Inc., 10 E.A.D. 700, 708 n.16 (EAB 2002); *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 519-20 (EAB 2002).

c. *Decision Appears to Be Predetermined*

Petitioners further challenge the adequacy of the Region's SEA by alleging that the Region predetermined the outcome of the NEPA analysis. Second Petition at 34-35. Petitioners note that the Region only undertook and completed the SEA after Petitioners filed their first appeal. *Id.* at 34. The Region conducted the SEA, Petitioners argue, in an attempt to insulate the NPDES permit from legal challenge under NEPA. Petitioners view the fact that the Permit terms did not change after issuance of the SEA as evidence of the Region's predetermination to issue the Permit. Petitioners cite to *Metcalf v. Daley*, 241 F.3d 135 (9th Cir. 2000), for the proposition that an EA done to justify a decision already made violates NEPA. Second Petition at 34.

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include "brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." *Id.* § 1508.9(b). We, therefore, cannot conclude that the Region's SEA fails to comply with the regulatory requirements cited by Petitioners. Moreover, to the extent that Petitioners' challenges are also challenges to the TMDL and to the Region's decision to rely on the Pinto Creek TMDL findings in issuing the SEA, we will not entertain them. *See In re City of Moscow*, 10 E.A.D. 135, 161 (EAB 2001).

Commenters on the Region's SEA raised the same argument during the Second Public Comment Period. Response to Comments Second Comment Period at 83 (Comment #32-2). In its response to comments, the Region denied that its decision was predetermined and stated that the SEA was a good faith effort to look at the environmental consequences of the two withdrawn conditions. *Id.* (Response #32-2). The Region cited two cases, *Friends of Richards-Gebaur Airport v. FAA,* 251 F.3d 1178, 1187 n.3 (8th Cir. 2001), and *National Audubon Society v. Hoffman,* 132 F.3d 7, 25 (2d Cir. 1997), for the proposition that Petitioners are required to show bad faith in order to overcome the presumption of regularity accorded to an agency action. Second Comment Period at 83 (Response #32-2)

In their reply brief, Petitioners argue that the Region's decision is not entitled to deference and claim that a strong showing of bad faith is not required when an agency's objectivity is suspect. Reply Brief at 48 (citing *Am. Wildlands v. U. S. Forest Serv.,* No. CV-97-160-M-DWM (D. Mont. Apr. 14, 1999)).

We must reject Petitioners' arguments. In *Laguna Greenbelt, Inc. v. U.S. Department of Transportation,* 42 F.3d 517 (9th Cir. 1994), the Ninth Circuit held that an agency's intention or predisposition in drafting an EA is irrelevant if the EA itself ultimately satisfies NEPA requirements. 42 F.3d at 524 n.4. In other words, satisfaction of NEPA's requirements is itself an objective indicator of good faith. Because Petitioners have not prevailed in any of their

arguments that the Region's SEA fails to satisfy NEPA, review of this argument must be denied. In addition, that the Permit conditions did not change after the issuance of the Region's SEA is not indicative, under the circumstances here, of bias or predetermination. To the contrary, the fact that the Region sought a stay and partial withdrawal of permit conditions for purposes of conducting further evaluation of some of the terms of the Permit, subjecting the Permit and SEA to public scrutiny and further responding to comments, is evidence that the Region was taking its obligations seriously. Moreover, as discussed in Parts III.A and III.B of this decision, the challenged Permit conditions are well-supported by the record. Therefore, we have no basis for questioning the Region's objectivity in conducting its NEPA review.[136]

IV. *CONCLUSION*

For the foregoing reasons, we deny review of the Permit.

So ordered.

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[136] Because we find that Petitioners failed to meet their burden of showing that the Region's SEA does not comply with NEPA, we do not find it necessary to reach the Region's argument that a "strong showing of bad faith" is required to overcome the presumption of regularity.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRIENDS OF PINTO CREEK; et al., Petitioners, CARLOTA COPPER COMPANY, Intervenor, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL APPEALS BOARD; et al., Respondents.	No. 05-70785 ORDER (Filed Mar. 7, 2008)

Before: HUG, TASHIMA, and GOULD, Circuit Judges.

Judge Gould votes to deny the petition for rehearing en banc. Judge Hug and Judge Tashima recommend denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

STATUTES AND REGULATIONS

1. Section 301(a), -(b)(1)(A)-(b)(1)C) of the Clean Water Act, 33 U.S.C. § 1311(a), -(b)(1)(A)-(b)(1)(C):

> (a) Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.
>
> (b) In order to carry out the objectives of this chapter there shall be achieved –
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> (1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and
>
> (B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or
>
> (C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or

schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

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2. Section 306(a)(1) of the Clean Water Act, 33 U.S.C. § 1316(a)(1):

(a) For purposes of this section:

(1) The term "standard of performance" means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

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3. Section 402(a)(1)-(a)(3) of the Clean Water Act, 33 U.S.C. § 1342(a)(1)-(a)(3):

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary

implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

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4. 40 C.F.R. § 122.4(i):

No permit may be issued:

(a) When the conditions of the permit do not provide for compliance with the applicable requirements of CWA, or regulations promulgated under CWA;

(b) When the applicant is required to obtain a State or other appropriate certification under section 401 of CWA and § 124.53 and that certification has not been obtained or waived;

(c) By the State Director where the Regional Administrator has objected to issuance of the permit under § 123.44;

(d) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States;

(e) When, in the judgment of the Secretary, anchorage and navigation in or on any of the waters of the United States would be substantially impaired by the discharge;

(f) For the discharge of any radiological, chemical, or biological warfare agent or high-level radioactive waste;

(g) For any discharge inconsistent with a plan or plan amendment approved under section 208(b) of CWA;

(h) For any discharge to the territorial sea, the waters of the contiguous zone, or the oceans in the following circumstances:

(1) Before the promulgation of guidelines under section 403(c) of CWA (for determining degradation of the waters of the territorial seas, the contiguous zone, and the oceans) unless the Director determines permit issuance to be in the public interest; or

(2) After promulgation of guidelines under section 403(c) of CWA, when insufficient information exists to make a reasonable judgment whether the discharge complies with them.

(i) To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge

into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by sections 301(b)(1)(A) and 301(b)(1)(B) of CWA, and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment, that:

(1) There are sufficient remaining pollutant load allocations to allow for the discharge; and

(2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards. The Director may waive the submission of information by the new source or new discharger required by paragraph (i) of this section if the Director determines that the Director already has adequate information to evaluate the request. An explanation of the development of limitations to meet the criteria of this paragraph (i)(2) is to be included in the fact sheet to the permit under § 124.56(b)(1) of this chapter.